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No. 168

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES, PETITIONER

v.

PEWEE COAL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

CITATIONS

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PEWEE COAL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on February 6, 1950.

OPINION BELOW

The opinion of the Court of Claims (R. 41-47) is reported at 88 F. Supp. 426.

JURISDICTION

The judgment of the Court of Claims was entered on February 6, 1950 (R. 48). A motion by the United States for a new trial, seasonably filed,

was denied on April 3, 1950 (R. 48). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

In the spring of 1943, a wage dispute developed between the operators of the nation's bituminous coal mines, including respondent Pewee Coal Company, Inc., and the United Mine Workers of America, representing the miners. The President by Executive Order authorized the assumption of federal control over the coal mines solely for the purpose of putting an end to the miners' work stoppages, since the continued operation of the coal mines was deemed essential to the successful prosecution of the war. The Government's control was not intended to, nor did it in fact, interfere with the normal operations of Pewee's business, and its intervention had the effect of stopping strikes which might well have been ruinous not only to the nation generally but to the coal mine operators. The questions presented are:

1. Whether the Government's intervention resulted in a temporary taking of Pewee's coal mine so as to entitle it to just compensation under the Fifth Amendment.

2. Whether, if there was such a taking, Pewee is entitled to any compensation since no actual loss has been shown and in any event it received substantial benefits from the Government's actions, far outweighing any losses it may have incurred as a result thereof.

STATEMENT

This is a suit for just compensation under the Fifth Amendment (R. 2) for the alleged taking by the Government of Pewee's coal mine, pursuant to Executive Order No. 9340, issued by the President on May 1, 1943, in an effort to avert a nation-wide strike of the coal miners. The Court of Claims held that Pewee's mine had been taken and awarded as just compensation $2,241.26, the amount of increased compensation directed to be paid to the miners during the period of the "taking" in accordance with a War Labor Board (WLB) directive. The facts here pertinent—as found by the Court of Claims—follow:

A. *The Work Stoppages and Government Intervention:* Pewee Coal Company,[1] a Tennessee corporation engaged in the business of mining and marketing bituminous coal, is a member of the Southern Appalachian Coal Operators' Association (R. 3-4). Its 150 miners are members of District 19, United Mine Workers of America (UMWA) (R. 4). When the United States entered World War II, the Association and UMWA

[1] Pewee was organized in August 1939 with its principal offices in Knoxville (R. 3). Its coal mine is in the Cumberland Mountains about 50 miles northwest of Knoxville on property which it leased on November 28, 1939, for a period of 40 years with an option to renew for a further term of 30 years (R. 3). The mine was first opened and developed in 1940; it passed from the development state to production in the early part of 1941 (R. 4). Thereafter, it continuously produced coal, except when its miners were out on strike, until the spring of 1944, when the mine was abandoned because the coal could not be mined profitably (*infra*, fn. 14, pp. 15-16) (R. 39-40).

were parties to various contracts which expired on March 31, 1943 and which governed the terms and conditions of employment at, among others, Pewee's mine[2] (R. 4-5).

At the contract-renewal negotiations which got under way in March 1943, UMWA's president, John L. Lewis, attacked the WLB's "Little Steel" formula[3] as unjustified in view of rising living costs, and sought, as part of his wage demands, a wage increase of $2.00 per day and a minimum wage of $8.00 per day, which the operators rejected (R. 5). The operators' proposal of a thirty-day extension of the existing contract was agreed to by the miners upon the request of the President, to

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[2] The governing contracts were: (1) an agreement of July 5, 1941, known as the "Southern Wage Agreement", (2) a subsidiary agreement of October 23, 1941, known as the "Southern Appalachian District Agreement," and (3) a further agreement of February 11, 1943 known as the "Six Day Supplemental Agreement" (R. 4-5). This last contract authorized the six-day work week in the industry and forced Pewee to discontinue its practice of avoiding overtime pay while working the mine six days a week by rotating the men, and instead required it to offer work on a straight five or six-day basis. To avoid the production loss entailed in the shorter work week, Pewee elected to incur the extra cost of a six-day schedule in February, 1943 (R. 23-24).

[3] The War Labor Board was created January 12, 1942, by Executive Order No. 9017 (7 Fed. Reg. 237) for the peaceful determination of labor disputes during the war period whenever there was a failure to reach agreement through collective bargaining. Its creation was an outgrowth of the national "no-strike" agreement which the President obtained from American labor leaders, including John L. Lewis, shortly after Pearl Harbor.

The so-called "Little Steel" formula was promulgated in April 1942 and permitted workers, in general, to receive an increase of up to 15% of their January 1, 1943, pay. *Little Steel Companies*, 1 War Lab. Rep. 325.

whom the operators had appealed to intervene (R. 5-7). On April 9, the southern operators, in accordance with their earlier suggestions (R. 5), officially asked WLB to assume jurisdiction over the dispute and on April 12 made a similar request to the President (R. 6-7).[4] On April 22, the issues were certified to WLB, which held a hearing in which the operators but not the miners participated; the UMWA refused to submit the miners' case to what it deemed a "circumscribed" WLB (*supra*, p. 4) (R. 7-8). Concurrently, a walkout of the miners started which, despite the President's appeal to the miners' patriotism, became complete on April 30 (R. 7-9).

On May 1, 1943, the President issued Executive Order No. 9340 (8 Fed. Reg. 5695) authorizing and directing the Secretary of the Interior "* * * to take immediate possession, so far as may be necessary or desirable" of the struck mines (*infra*, pp. 7-8) (R. 10-11), and later the same day, the Secretary of the Interior issued "Order for Taking Possession" (*infra*, pp. 8-9) (R. 12-13).[5] The

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[4] On April 8, 1943, the President issued his so-called "hold-the-line" Executive Order, No. 9328 (8 F. R. 4681), directing, *inter alia*, that the several government agencies charged with the stabilization of wages and prices authorize no further wage or salary increases except those which were necessary to correct substandards of living and were within the framework of the "Little Steel" formula; that no increases in the ceiling prices of commodities be authorized except to the minimum extent permitted by law; and that excessively high prices be reduced.

[5] The order included all of the approximately 2,850 mines whose output exceeded 50 tons a day and whose aggregate

following day, Mr. Lewis acceded to the Secretary's request and announced a two-week truce (R. 15) which was subsequently extended to May 31, 1943 (R. 16).

On May 25, after further hearings, at which a WLB official represented the miners' interests, WLB rendered its preliminary decision in which it rejected the bulk of the miners' demands, but approved, as of April 1, 1943, the demands that a $30 increase in annual vacation pay be granted and that the operators bear the cost of occupational charges, such as those for lamps furnished the miners (R. 16).[6] The negotiations as to a guaranteed six-day work week and portal pay, which were resumed at WLB's suggestion, soon became deadlocked (R. 16). A second general strike started on June 1 but was terminated at the President's request on June 7 (Pewee's miners returned June 9) under a truce until June 21 (R. 16-17). After further hearings, in which UMWA still refused to participate, WLB on June 18 denied UMWA's demands and, in substance, extended the 1941-1943 agreement, as modified by it on May 25 (*supra*, this page), unless

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tonnage accounted for about 95% of the total bituminous coal production, together with all of the so-called "rail" mines regardless of size (R. 12).

[6] 8 War Lab. Rep. 502. UMWA's demands rejected by WLB included, *inter alia*, a $2.00 a day wage increase, double pay for Sunday work, a guaranteed work-year of 52 weeks. The Board's opinion also indicated that the operators and UMWA should resume negotiations on the demands for a guaranteed six-day week and portal-to-portal pay (R. 16).

changed by mutual agreement (R. 17).[7] A third general strike started on June 21 (R. 17), and despite UMWA's instructions to the miners, at Mr. Ickes' request, to resume work under the Government until October 31, 1943, with the understanding that the arrangement would "automatically terminate if government control is vacated" before then, many miners remained idle and Pewee's men stayed out until July 6 (R. 17). Upon the return of the men, both the President and Secretary Ickes stated that control of the mines would be terminated within 60 days after attaining full productivity.[8]

B. *The "Taking" of Pewee's Mine:* The President's Executive Order No. 9340 of May 1, 1943 (8 Fed. Reg. 5695) (*supra*, p. 5), authorized and directed Secretary of the Interior Ickes (R. 10),

> * * * to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the opera-

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[7] 9 War Lab. Rep. 112. WLB denied the portal-pay claim as beyond its jurisdiction.

[8] These statements were made in accordance with Section 3 of the War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App. 1501 *et seq.*), which Congress enacted on June 25, 1943, over the President's veto, and which provided that "any plant, mine or facility" theretofore or thereafter taken by the United States should be returned "as soon as practicable but in no event more than sixty days after the restoration of the productive efficiency thereof."

tion of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.

In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

In his "Order for Taking Possession" (8 Fed. Reg. 5767), also issued on May 1, 1943 (*supra*, p. 5), Secretary Ickes stated (R. 12-13):

* * * I hereby * * * take possession of each such mine including any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines and the distribution and sale of its products, for operation by the United States in furtherance of the prosecution of the war.

The president of each company (or its chief executive officer) * * * is hereby and until further notice designated operating manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to do all things necessary and appropriate for the operation

of the mine, and for the distribution and sale of the product thereof.

All of the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

* * * * *

The operating manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons in possession of funds and properties due and owing to the company.

* * * * *

On the same day, Mr. Ickes issued an order designating the eleven regional managers of the Bituminous Coal Division, Department of the Interior, as regional bituminous coal managers, and setting forth their duties and authority (R. 13-15).[9]

"However," the Court of Claims found, "no control over [Pewee's] operations was in fact

[9] Secretary Ickes, also on May 1, delegated his authority under Executive Order No. 9340, to himself as Administrator, and to the Deputy Administrator of the Solid Fuels Administration for War created by Executive Order No. 9332 (8 Fed. Reg. 5355) (R. 13).

exercised," except in regard to the increased employee benefits awarded by WLB (*supra*, p. 6; *infra*, p. 12) (R. 15). The company's "management and personnel performed their customary functions and duties in the regular and normal course of its business; no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner. Plaintiff's mining operations subsequent to May 1, 1943, are not shown to have been in any respect different because of Government control." (R. 40-41).

The only actions taken by the federal authorities with respect to Pewee's mine were as follows:[10]

1. On May 1, Secretary Ickes telegraphed the chief executive officer of each mine to indicate his willingness to serve as Operating Manager (R. 18-19). In Pewee's case, the mine superintendent accepted in the absence of the company's president, raised the American flag at the mine, and carried out the other instructions contained in the telegram (R. 19). Subsequently, when the Government called his attention to the fact that no acceptance had been received from him as chief executive officer, Pewee's president promptly telegraphed his own acceptance and confirmed that of the superintendent (R. 19). On May 12, Secretary Ickes sent to the chief executive officer of

[10] Neither party has challenged the validity of these particular actions, the Executive Order, or the Secretary's general action under the Order.

each mining company, including Pewee, a certificate embodying formal instructions and appointment as Operating Manager for the United States (R. 19-21); on May 19, he promulgated "Regulations for the Operation of Coal Mines under Government Control" (8 Fed. Reg. 6655). (R. 21).[11]

On May 5 and 6, the Operating Managers were furnished (1) placards carrying the American flag, the caption "United States Property," and the text of Secretary Ickes' "Order For Taking Possession," (2) other posters carrying the flag and excerpts from the President's radio address May 2 appealing to the miners "to heed the clear call to duty", and (3) booklets containing the full text of the May 2 appeal and extracts from Executive Order 9340 (R. 21-22). As instructed, Pewee's officers put up the posters and placards on the company property and at various places in the mining towns, and distributed the booklets to the miners (R. 22).

2. As part of their contention that living costs had risen disproportionately to wages, the miners claimed that the company stores were disregarding OPA price ceilings (R. 22). On May 3, Secretary Ickes directed that mine stores comply with these regulations (R. 22). Shortly thereafter, the Secretary conducted a survey of company stores and commissaries to determine their costs and selling prices

[11] The pertinent provisions of the Certificate of Appointment and of the Coal Mine Regulations are set out in the Appendix, *infra*, pp. 31-42.

(R. 22). Pewee furnished certain information in regard thereto as requested and in addition advised the Secretary that it would "carefully follow" the May 3 directive (R. 22). Also, about 2 months later, Secretary Ickes, in conjunction with his campaign to reduce accidents in the coal fields, instructed the mines to operate in full compliance with state and federal safety laws and regulations (R. 22).

3. On June 7, 1943, concurrently with the return of the miners to work after the second general strike (*supra*, p. 6), the Solid Fuels Administration instructed the Operating Managers to carry into effect WLB's decision of May 25 in regard to increased vacation compensation and refund of occupational charges (*supra*, p. 6), stating that in all other respects the terms and conditions of employment would continue to be those which obtained under the old contracts (R. 23). These were the terms of employment thruout the remainder of the control period (R. 23). On or about June 30, Pewee made the increased vacation payments at a cost of $1,890 over what the old contract would have required, and refunded $351.26 for lamp rentals previously collected (R. 23).

4. As stated above, Pewee had previously elected to incur the extra cost of a six-day week work schedule, as authorized by the February 11 1943 amendment of the wage contracts (*supra*, fn. 2, p. 4)

(R. 23-24).[12] Although the schedule did not result in the anticipated production, Pewee in March 1943 decided to remain on that schedule (R. 24). On May 3, Secretary Ickes directed all mines to operate on the six-day week, stating that OPA had recently granted coal price increases to cover that operation and he intended to recommend rescission thereof as to any mine that failed to comply (R. 23). On two occasions during May, Pewee informed the Solid Fuels Administration that it intended to continue the six-day week "unless conditions beyond our control, such as car shortage, etc., make this impossible" (R. 24).

3. Prior to government control, the Solid Fuels Administration, in furtherance of its supply and distribution functions under Executive Order 9332, had asked each bituminous coal producer to file a weekly card report of its production and running time (R. 24). On May 12, 1943, the mines were sent a form memorandum requesting prompt submission of these reports so that the Solid Fuels Administration would be informed as to the availability of bituminous coal for war needs (R. 24-25). In order to keep the Government informed regarding work stoppages, their causes and effect on pro-

[12] The amendment also authorized holiday work at time and a half, if consented to by the parties locally (R. 24). While the Government asked the mines to maintain operations on 3 holidays during the period here involved, Pewee was affected only by the request in regard to work on Labor Day and the proof does not reveal whether its men worked on that day (R. 24).

duction, the Operating Managers were instructed, beginning May 17, to make daily reports of tonnage and labor force of the previous day, together with figures which would reflect whether the situation was normal (R. 25). In Pewee's area, this information was collected by telephone by the Government's local representative who then transmitted the results to the regional office (R. 25). These calls were made at the expense of the mines, and in Pewee's case, because of its proximity to the points to and from which they were made, the calls involved a cost of approximately 60 cents a day (R. 25).

6. In accordance with his earlier statement (*supra*, p. 7), Secretary Ickes on July 29 instructed the Operating Managers to furnish information upon which he could make a determination as to the release of their mines (R. 26). In response thereto, Pewee's president on August 6 wrote (R. 26-27):

> * * * in my opinion the Government should continue active control of the mines, if not all mines, certainly mines such as ours whose finances are in none too good condition if and until a new wage contract is negotiated since anything like a $1.25 per day wage increase retroactive to April 1st [13] would completely bankrupt such mining companies.

[13] In the latter part of July, 1943, UMWA signed a contract with a segment of the industry, to apply retroactively to April 1, 1943, which provided for this $1.25 payment and certain other benefits for the miners. 10 War Labor Rep. 684, 770.

And on October 4, in response to further requests, respondent's president sent in the requested tonnage figures, with his opinion that (R. 27):

> * * * the productive efficiency at this mine has not been restored and as indicated in other communications our tonnage continues considerably off on account of inefficiency, absenteeism, unfavorable operating conditions, etc.

Meanwhile, beginning on August 20, Secretary Ickes, on the basis of figures submitted, continued to release mines, until October 12 when he promulgated an omnibus order releasing all remaining mines, including Pewee (R. 25-26).

In its opinion, the Court of Claims, relying on *United States* v. *United Mine Workers*, 330 U. S. 258, held that "the Government did in fact, as well as in name, take possession of [Pewee's] mine" (R. 45). It refused to award as a part of just compensation the $36,128.96 loss suffered by Pewee during the period of government control on the ground that it was not attributable to any act of the Government (R. 46-47).[14] The court, however,

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[14] The court found that Pewee's tonnage was seriously reduced subsequent to May 1, 1943 by underground physical conditions due to (1) the use of the unconventional method of working the mine "on the advance" rather than "on the retreat," and (2) the taking of excessive amounts of coal from certain of the pillars and room walls, thus weakening the supports and setting in motion a gradual shifting of the mountain top above the mine (R. 30). This movement or "squeeze" finally manifested itself in May 1943, with the result that

referring to *Wheelock Bros., Inc.* v. *United States*, C. Cls. No. 46982, which it decided on the same day, held that the increased compensation amounting to $2,241.26 (*supra*, p. 12) which Secretary Ickes had directed to be paid in accordance with WLB's directive was an extra expense occasioned by the Government's action, and entered its judgment for that amount (R. 48). Judge Madden dissented (R. 47-48).

REASONS FOR GRANTING THE WRIT

This case and *United States* v. *Wheelock Bros., Inc.*, No. 169, in which the Government is simultaneously filing a petition for a writ of certiorari, raise important and novel questions, one of which was suggested but found unnecessary to be passed upon in *United States* v. *United Mine Workers*, 330 U. S. 258. In both cases, the Government intervened to avert a work stoppage which would have crippled a vital industry necessary for the successful prosecution of the war. In each case, as has been true in the greater percentage of businesses involved in similar seizures, the Government's control was not intended to, nor did it in fact, interfere with the normal operation of the business. In each case, it is demonstrable that the

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the roof began collapsing in part of the mine (R. 30-31). Also in July 1943, the mine's main entry was driven into the initial stages of a "fault" or low-coal area (R. 31). After numerous conferences among Pewee's officers (in which government officials did not participate) it was decided to continue trying to work the mine (R. 32-33). But since there was no indication that the fault would disappear, it was decided temporarily to abandon the mine in January 1944 (R. 34, 39). The mine was permanently abandoned a few months thereafter (R. 39).

Government's intervention had the effect of preventing a strike which might well have been ruinous not only to the nation generally but to the owners of the enterprises involved.

The holdings by the court below that these actions of the Government resulted in a Fifth Amendment "taking" and that the just compensation for such taking is to be measured by the increased wage benefits paid the employees during the period of the taking, are, we believe, clearly unsound. These holdings, if not corrected, will establish a rule under which large and uncharted liabilities, possibly aggregating scores of millions of dollars, can be imposed on the Government for other such seizures, including (1) the three subsequent seizures of the Nation's approximately 3,000 coal mines employing about 400,000 miners,[15] and (2) the seizure of the 102 other midwestern motor carrier systems similar to that involved in *Wheelock*, claims for which are now pending before a

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[15] On November 1, 1943, shortly after the release of the mines seized pursuant to Executive Order No. 9340, the coal mines were again seized in order to avert another threatened nation-wide coal strike (see Executive Order 9393, 8 Fed. Reg. 14877); the mines so seized were not all released until June 21, 1944 (9 Fed. Reg. 6954). The Government seized the bituminous coal mines a third time, on April 10, 1945 (see Executive Order 9536, 10 Fed. Reg. 3939), and released them by the middle of June 1945. 10 Fed. Reg. 7263, 7265. The fourth seizure of the bituminous coal mines was on May 21, 1946 (see Executive Order 9728, 11 Fed. Reg. 5593) and lasted until June 30, 1947, when the War Labor Disputes Act expired. 12 Fed. Reg. 4248. This last seizure was the one involved in *United States* v. *United Mine Workers*, 330 U. S. 258.

special Motor Carrier Claims Commission.[16] In addition, the decisions below will have great effect upon the future use of, and future legislation involving, this method for effective government control of strikes in critical industries, the necessity for which has been increasingly shown by the events of recent years.

1. The facts of this case fall far short of showing such interference with, or destruction of, Pewee's ownership, possession, or use of its property as would be necessary, under any proper reading of the Fifth Amendment's just compensation clause, to support the conclusion that there had been a "taking" of the coal mine. See, *United States* v. *General Motors Corp.*, 323 U. S. 373, 378; *United States* v. *Lynah*, 188 U. S. 445, 469-470; *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 171; *Block* v. *Hirsh*, 256 U. S. 135; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393; *Lichter* v. *United States*, 334 U. S. 742; *Marion & Rye Valley Railway* v. *United States*, 60 C. Cls. 230, affirmed, 270 U. S. 280; *Nevada-California-Oregon Ry.* v. *United*

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[16] The Motor Carrier Claims Commission was created by the Act of July 2, 1948 (62 Stat. 1222, 49 U. S. C., Supp. II, 305 note) to pass on the claims arising out of the Government's seizure of motor carrier transportation systems under Executive Order No. 9462 (9 Fed. Reg. 10071), involved in *Wheelock*. While refraining from "a blanket endorsement of a 'taking' in the legal sense," Congress established this Commission in order to provide a more expeditious means for handling the carriers' claims than those provided by normal channels. H. Rep. No. 2182, 80th Cong., 2d sess., p. 3. The disposition of these claims, aggregating several millions of dollars, will undoubtedly be in large measure influenced, if not controlled, by the cases here.

States, 65 C. Cls. 75, certiorari denied, 278 U. S. 602; 1 Lewis, *Eminent Domain* (3rd Ed.), Sec. 65.

(a) In holding that there was a taking, the court below relied primarily on the terms of Executive Order No. 9340 and the directives issued by Secretary Ickes. But directives such as those requiring the flying of the American flag, the displaying of certain posters, and the distribution of booklets to the miners, clearly involved no interference, substantial or otherwise, with the management and control of Pewee's coal mine. Other directives providing that the company stores reduce price to OPA ceilings (*supra*, pp. 11-12); that the company comply with state and federal safety laws (*supra*, p. 12); and that the Solid Fuels Administration be furnished with daily tonnage and labor figures (*supra*, pp. 13-14), imposed no additional burden on Pewee, since they merely required compliance with laws and Executive Orders to which Pewee had already been subject. The same is true of the order (*supra*, p. 12), requiring payment of increased benefits to the miners in accordance with WLB's directive. As the findings plainly demonstrate, this award, which gave the miners but a small fraction of their demands, was fully acceptable to the operators upon whose repeated requests the dispute had been submitted to the WLB and who, unlike UMWA, had participated actively in the WLB proceedings. *Supra*, pp. 5-7.

Not only do these directives fail to show, in themselves, that Pewee's mine was actually taken, but any such inference which might be drawn from them is more than overbalanced by the Government's limited objective for intervening—termination of the miner's work stoppages which threatened the nation's economy and obstructed the war effort—and by the restricted scope of the Government's other actions. Taken together, these factors make it quite clear that Pewee's mine was in fact not taken by the United States within the meaning of the Fifth Amendment. For while the President by his Executive Order authorized and directed Secretary Ickes to take the mines in the constitutional sense, he did not require that this be done unless it be "necessary or desirable", and he patently intended a minimum of interference with the management of the mines; he instructed Secretary Ickes to "permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order," which were, as the order stated, "to protect the interests of the nation at war and the right of workers to continue at work" (R. 10).

Consistently with this direction, Secretary Ickes did not undertake to interfere with or take over Pewee's operations. In designating the chief executive officer of each mine as its Operating Manager, Secretary Ickes advised him and all other officers and employees to proceed with the performance of "their usual functions and duties in

connection with the operation of the mine and the production, distribution and sale of the product thereof." Appendix, *infra*, p. 31. The Coal Mine Regulations, in addition to containing similar provisions as to the Operating Managers,[17] went further and permitted the company to continue (1) to enter and discharge contracts and other obligations in the ordinary way, (2) to serve customers of their own selection, (3) to effect such financial transactions as they deemed necessary "utilizing any or all funds due or owing or belonging to the company," (4) to collect and retain the revenues from the business,[18] (5) to effect such changes in the plant, equipment, and capital structure as they saw fit, (6) to remain subject to all state laws,[19] and (7) to

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[17] The Regulations provided that the Operating Manager was to serve his company as its authorized agent in respect of all actions he was empowered to take "in the absence of Government control," that he remained "subject to all restrictions and limitations imposed by the company" upon his authority, that he was to continue performing for his company all "ordinary duties of management in accordance with established policies and practices," and that his appointment could be objected to or revoked at the company's request. *Infra*, pp. 36-38. As Operating Manager, the company's chief executive was called upon to perform for the Government only such "special duties" as were or might be required in connection with the control program (*infra*, p. 38).

[18] If Pewee's property had been "taken", its revenues would have belonged to the Government. *E. I. duPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 185. Pewee did not, however, treat the revenues from its business as being received for the Government's account nor was it required to do so.

[19] This, of course, was incompatible with a "taking" since state laws would have been inapplicable to federal property. *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554; *North Carolina Railroad Co.* v. *Lee*, 260 U. S. 16.

be amenable to suit as fully as if government control had not intervened. Appendix, *infra*, p. 34, *et seq.* And, as contemplated by the Secretary's regulations, business did continue as usual without interference by the Government. The court below found that during the period of government control, Pewee's "management and personnel performed their customary functions and duties in the regular and normal course of its business; no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner. [Pewee's] mining operations subsequent to May 1, 1943, are not shown to have been in any respect different because of Government control" (R. 40-41). See, also, R. 41-42.

Clearly, therefore, although the Government had the power to take the mines, the situation as it developed made the exercise of that power unnecessary and hence there was, we submit, no taking. The Executive Order and the powers vested in the Secretary constituted no more than formal notification that a taking would occur if that action turned out to be "necessary or desirable", and if control-less-than-taking were insufficient. Cf. *United States* v. *Sponenbarger*, 308 U.S. 256, 267-8. And, as we have shown, the Secretary's subsequent orders and regulations, far from consummating this potential power to take respondent's mine, defin-

itively negatived such a step.[20] In addition, the clear net benefit to the company from the take-over (*infra*, pp. 28-30) supplies separate support for the same conclusion, since a taking will not readily be inferred from Government action "that does little injury in comparison with far greater benefits conferred" (*United States* v. *Sponenbarger*, *supra*, at 266-267).

(b) The Court of Claims' conclusion here is also at odds with its earlier holding in *Marion & Rye Valley Ry.* v. *United States*, 60 C. Cls. 230, affirmed, 270 U. S. 280, where in closely analogous circumstances the Court of Claims held that there had been no Fifth Amendment taking.[21] In that case, which arose out of Federal control and operation of the railroads during World War I, the

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[20] For lower court decisions suggesting, in other contexts, that operators of coal mines subject to Government seizure were not deprived of the ownership, use, or possession of their property, see *Warner Coal Corp.* v. *Costanzo Transportation Co.*, 144 F. 2d 589, 593-4 (C. A. 4), certiorari denied, 323 U. S. 791; *Glen Alden Coal Co.* v. *N. L. R. B.*, 141 F. 2d 47, 51-2 (C. A. 3); *Consagra Coal Co.* v. *Borough of Blakely*, 55 F. Supp. 76 (M. D. Pa.); *Stanton* v. *Ruthbell Coal Co.*, 127 W. Va. 685, 694-698.

[21] On appeal, this Court found it unnecessary to pass on this question, since the Court held that "even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss" (270 U. S. at 282). See *infra*, p. 30.

See, also, *Nevada-California-Oregon Ry.* v. *United States*, 65 C. Cls. 75, certiorari denied, 278 U. S. 602, where the Court of Claims, on even stronger facts, again held that there had been no taking.

President issued a Proclamation in which he announced *inter alia* that "I * * * do hereby * * * take possession, and assume control * * * of * * * every system of transportation" and that "all transportation systems shall conclusively be deemed within the possession and control of [the Director General of Railroads] without further act or notice" (60 C. Cls. at 231-234, 232, 234). The Proclamation, moreover, unlike the present Executive Order, expressly provided for the payment of just and reasonable compensation. 60 C. Cls. at 233. The Director General of Railroads issued to the railroad orders reciting that he had "taken possession and assumed control of" the transportation system; that officers, agents and employees of such system "may continue in the performance of their present regular duties"; that accounts of the railroads should be closed as of the beginning date of Federal control and opened as of the next day (60 C. Cls. at 237-238); and that "Every railroad officer and employee is now, in effect, in the service of the United States" (60 C. Cls. at 239). He also ordered a general increase in rates (60 C. Cls. at 241). The Court of Claims found further, as it did here, that (in the words used by this Court in summarizing the findings, 270 U. S., at 282-283):

> [the Director General of Railroads] did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific direction as to its management or operation; and did not at any time interfere in any way with its conduct or activi-

> ties. The company retained possession and continued in the operation of its railroad throughout the period in question. The railroad was operated during the period exactly as it had been before, without change in the manner, method or purpose of operation. * * * The character of the traffic remained the same. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of the traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the Government, devoted the net operating income to the company's use.

Based on these findings, the court concluded that there had been no taking, since, it held (60 C. Cls., at 249-250) there was an absence of the evidence necessary

> to show that the use of the property was such that its common and necessary use was so seriously interrupted as to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him from deriving the benefits which would have accrued had the property not been taken. * * * A mere declaration of an intention to take cannot constitute a taking. The proclamation of the President setting forth that on some future day he will take over the property of certain owners does not of itself constitute a taking of the property. There must be some definite act, some positive

> proceeding by which the property is actually taken and appropriated before the taking can be consummated. It must be such a taking of the property as that the owner is deprived of, or circumscribed in some way, in the use and enjoyment of his property. If his possession is undisturbed and his property in its value and use is undiminished it cannot be said that there is a taking within the meaning of the Constitution.

The detailed findings of the Court of Claims in the present case similarly reveal that the Government's action did not result in interference with the control and operation of Pewee and, accordingly, that Pewee's mine was never taken.[22]

(c) Contrary to the court below (R. 45), *United States* v. *United Mine Workers*, 330 U. S. 258, is not decisive here. The instant problem, while suggested in the *Mine Workers* opinion, was expressedly not passed upon by the Court. That case, which arose during the fourth government coal mine seizure in 1946-7 (*supra*, fn. 15, p. 17), did not involve any determination of the relationship between the Government and the operators, but rather was mainly concerned with the relation-

[22] The comprehensive regulation of the coal mines under the Bituminous Coal Act of 1937—pursuant to which minimum coal prices were prescribed, production practices were regulated in certain respects, marketing was subject to detailed rules relating, *inter alia*, to discounts and payment terms, records had to be kept in a specified manner, and monthly reports relating to costs, tonnage, and income had to be filed—has never been thought to involve a "taking." See, *e. g.*, *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

ship between the Government and the miners for the limited purpose of determining the applicability of the anti-injunction provisions of the Norris-LaGuardia Act.[23] In holding that for this purpose the miners were employees of the Government, the Court relied primarily upon the objectives of government control and the Krug-Lewis agreement to which, the Court noted, the operators were not a party (330 U. S. at 287). The Court refused to "express any opinion as to the validity" of the various provisions of the Regulations defining the Government-operator relationship since they had "little persuasive weight in determining the nature of the relation existing between the Government and the mine workers" (330 U. S. at 288). Moreover, nowhere in the concurring opinion of Justice Frankfurter or the dissenting opinions of Justices Murphy and Rutledge is there any indication that these justices considered the Court's opinion as defining the relation between the Government and the operators or that they believed the mine properties to have been taken by the Gov-

[23] The Court's opinion states (330 U. S. at 285-286): "The question with which we are confronted is not whether the workers in mines under Government seizure are 'employees' of the Federal Government for every purpose which might be conceived [citing Sec. 23 of the Revised Regulations for the Operations of the Coal Mines Under Government Control, which provides "• • • nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment"] but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of governmental employer and employee."

ernment from the operators (330 U. S. at 307, 335 *et seq.*); the implications are, rather, to the contrary (330 U. S., at 319-322, 337-339). Justices Black and Douglas alone expressed the thought that "the Government operates these mines for its own account as a matter of law", but they, too, recognized that this was "apparently contrary to the implications of the regulations" (330 U. S. at 329).

2. The Court of Claims further erred in awarding as the measure of just compensation the amount of increased benefits which Secretary Ickes directed to be paid to the miners in accordance with WLB's findings of May 25, 1943, *supra*, pp. 6, 12. This holding was predicated on the similar ruling in the *Wheelock* case. In our petition in *Wheelock*, we show the unsoundness of that ruling as there applied (see Petition in No. 169, pp. 24-27). We think that that holding is *a fortiori* without substance in this case, for here, unlike *Wheelock*, the Government's intervention, as well as WLB's subsequent award, was fully acceptable to the operators. There is no reason to believe, on the one hand, that respondent would have refused to pay these increased benefits had the miners agreed to continue working on that basis without Government control (*supra*, pp. 5-7); and, on the other hand, it is plain that federal intervention resulted in a net benefit to the company. The Government intervened because the miners' heavy

demands and their refusal to submit them to WLB resulted in a deadlock in negotiations. It was only after the Government intervention that the miners reluctantly, after two additional general walk-outs of short duration, agreed to remain in the mines until October 31, 1943, and then only under an arrangement which would "automatically terminate if the government control is vacated" (R. 17). Not only was Pewee, together with the other operators, thereby relieved of the threat of heavy losses involved in maintaining an idle mine with its fixed overheads,[24] but they were also protected during the period of government control against the renewal by the miners of their wage demands, only a very small part of which Pewee was required to pay pursuant to WLB's award.

---

[24] "Coal operators are very sensitive to changes in the volume of production since there is an unusually large element of overhead. Capital charges go on unabated, and as days of operation diminish, the cost per ton increases rapidly. Property taxes are in no way moderated. Insurance has to be kept up. Pumping and ventilation costs do not diminish proportional with decreased tonnage. Depreciation goes on faster when the mine is idle than when it is working. Gas and acid waters require use of men, materials, and power. If the mine is mechanized, fixed charges are greater than otherwise in relation to direct costs * * *.

"Furthermore, the pressure to maintain production is brought about by the fact that if the mine is not maintained at operating efficiency it shortly becomes completely unusable. Falls of roof, squeezes, etc., set in and make recovery difficult if not impossible. The investment, in other words, has a very definite time element running against it. Maintenance workers' pay continues regardless of the time the mine operates. Superintendents must be paid; office employees are hired by the month." *The Coal Industry* by G. L. Parker, at p. 6. See also Hearings before House Committee on Ways and Means on Extension of Bituminous Coal Act of 1937, 78th Cong., 1st sess., at pp. 241-244.

That Pewee was aware of the great benefits it would and did receive from Government intervention is manifest both from the eagerness with which Pewee welcomed federal intervention (R. 19), and its recommendation of August 6 against termination of government control on the ground that a "$1.25 per day wage increase retroactive to April 1st [which reflected a 75% reduction over UMWA's original $5 a day demands] would completely bankrupt [it]" (R. 26-27), *supra*, p. 14. Clearly, therefore, even if there were a taking of Pewee's mine, it was not such a taking as entitled Pewee to any compensation under the Fifth Amendment, for there is no showing that the company incurred any loss as a result of the Government's action, and, in any event, the benefits resulting to Pewee were far greater than any losses it may have suffered; accordingly, "it would be gross injustice to * * * pay something for nothing." *Marion & Rye Valley Ry.* v. *United States*, 60 C. Cls. 230, 252, affirmed, 270 U. S. 280, 282, (*supra*, fn. 21, p. 23); *United States* v. *Sponenbarger*, 308 U. S. 256, 267; *United States* v. *Miller*, 317 U. S. 369, 376; *Bauman* v. *Ross*, 167 U. S. 548, 573-587.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1950.

APPENDIX

1. The Certificate of Appointment of Operating Managers, which is reproduced in the findings below (R. 19-21), provided:

> Whereas The Secretary of the Interior has, pursuant to the provisions contained in the Executive Order dated May 1, 1943, taken possession of the coal mines listed in the appendix attached hereto, I hereby designate and appoint you as Operating Manager for the United States for such mines. The Operating Manager shall have the following duties and authority, and shall perform the following functions:
>
> (1) The Operating Manager shall, subject to such supervision as may be prescribed, and in accordance with such regulations as may be promulgated, operate the mines listed in the attached appendix and do all things necessary and appropriate for the continued operation of such mines, and for the production, distribution and sale of the product thereof.
>
> (2) The Operating Manager and all other officers and employees of the company shall serve the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the production, distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.
>
> (3) The Operating Manager shall, in the operation of said mines, use the customary

personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but he shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, he shall communicate with the appropriate Regional Bituminous or Anthracite Coal Manager of the Solid Fuels Administration for War for transmission of said request to the proper officials.

(4) The Operating Manager shall maintain customary working conditions in the mines and customary machinery for the adjustment of workers' grievances and shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.

(8) The Operating Manager shall be subject to such accounting as the Solid Fuels Administrator for War may, from time to time, prescribe; and shall be governed by all orders, rules and regulations issued by the Solid Fuels Administrator for War.

(9) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

(10) The Operating Manager shall, in such operation, distribution and sale, comply with all applicable Federal and State laws and regulations.

(11) The Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States, (name of Company)", but the action in either case is for all purposes affecting the possession and control of the United States or the orders and regulations issued or to be issued relating thereto, to be considered as done by the Operating Manager.

(12) This appointment shall terminate at the discretion of the Solid Fuels Administrator for War upon notice to the Operating Manager.

(13) The Operating Manager shall, with respect to mines which he reasonably expects to continue in normal, regular operation, submit a recommendation that operation of such mines for the Government be terminated.

(14) This appointment shall be effective immediately.

2. The Coal Mines Regulations (8 Fed. Reg. 6655) provided in pertinent part:

PART 603—OPERATION OF COAL MINES UNDER GOVERNMENT CONTROL

GENERAL

* * * * * * *

§ 603.4 *Purpose of operation.* The primary object of Government intervention in the operation of the said properties is the maintenance of full production of coal for the effective prosecution of the war. All duties and authorities set forth in these regulations are to be construed in the light of this purpose, * * *

§ 603.5 *Plan and policy of operation.* (a) Control of the operations of the coal mines will be exercised by the Government to the extent necessary to maintain maximum production. Wherever the cooperation of the company and its personnel can be secured, the existing organization of the mining company will be utilized, and the company will continue operation in the regular course of business as a going enterprise, conforming with such directions as the Government may issue. * * *

(b) All properties in the possession of the Government shall be operated in a manner consistent with the fact that title to the properties remains in the owners thereof and that the Government, having temporarily taken possession or custody, will assert only such rights as are necessary to accomplish the national purpose of continued and maximum production.

(c) Possession and operation by the Government are to be terminated as soon as this

can be done without injury to the furtherance of the war program.

* * * * * * *

ORGANIZATION FOR OPERATION

* * * * * * *

§ 603.15 *Designation of Operating Managers.* (a) The operation of the coal mines of a mining company will ordinarily be entrusted to an officer of the company formerly in charge of operations who is authorized to act for the said company and who will, under appointment by the Administrator, during the period of Government control, act as Operating Manager for the United States, while continuing to serve as an officer and employee of the mining company. At the request of the said company, such person may be removed from the position of Operating Manager for the United States, and an officer or employee of the company nominated by the company may be appointed by the Administrator.

(b) Where the prompt and effective cooperation of the mining company in the operation of the coal mines under Government control cannot be secured, a person other than an officer or employee of the company may be designated as the Operating Manager for the United States by the Administrator.

(c) Where a company is in receivership or trusteeship, the receiver or trustee will ordinarily be designated Operating Manager for the United States.

§ 603.16 *Status of Operating Managers.* (a) Any officer or employee of a mining company

who, with the permission of, or without objection from, the said company, accepts designation as Operating Manager for the United States of the coal mines of said company shall, together with all other officers and employees, serve in full recognition of his responsibilities to the Government and subject to all orders and regulations of the Administrator, but he and all other officers and employees shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control of its property.

(b) The Operating Manager shall continue to be subject to all restrictions and limitations imposed by the company upon his exercise of his authority. In respect of any action to which or in which the company requires its special consent or concurrence, the Operating Manager shall obtain such consent or concurrence before he takes such action. * * *

(c) Designation of any person as Operating Manager for the United States shall not be deemed to constitute him an officer or employee of the United States within the meaning of Federal statutes governing personnel.

(d) The appointment of any Operating Manager shall terminate at the discretion of the Administrator upon notice to the Operating Manager.

§ 603.17 *Duties of Operating Managers.* (a) Operating Managers shall perform for their companies ordinary duties of management in

accordance with established policies and practices, so far as consistent with these regulations and the instructions and orders of the Administrator and Regional Managers, and shall in addition perform all special duties placed on them as Operating Managers of the United States by these regulations, by their appointment instructions, so far as consistent with these regulations, and by such orders as the Administrator or the Regional Managers may issue.

(b) An Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States, (name of company)".

OPERATION OF MINES

§ 603.20 *Statement of property taken.* The Operating Manager of each mine shall promptly submit to the Regional Manager of the area in which the mine is located a statement specifically enumerating and defining the properties under his management, in accordance with a form to be furnished by the Administrator. Such statement shall be promptly submitted by the Regional Manager to the Administrator with recommendations as to any corrections that may appear proper and shall be subject to such correction as the Administrator, or any other official specifically

designated for the purpose by the Administrator, shall from time to time find to be necessary. A copy of such revised statement shall be returned to each Operating Manager to serve as a guide to him and any successor Operating Manager in the performance of their functions.

§ 603.21 *Accounts and records.* (a) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise. The same set of books may be used so long as items of payments, receipts, and all other transactions engaged in on and after May 1, 1943, may be easily separated from items concerning transactions engaged in before that date.

(b) The Operating Manager shall render such accounting as the Administrator may, from time to time, prescribe.

§ 603.22 *Financial and commercial transactions.* (a) Ordinary financial and commercial transactions shall be carried on so far as possible, in accordance with the customary procedures and policies of the mining company. The Operating Managers shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to continue the enterprise, utilizing any funds or properties due or belonging to the mining company,

and shall draw upon the funds and accounts of the company, utilizing customary sources of credits or funds, and make all necessary disbursements. No major disbursements of an extraordinary nature shall be made without the approval of the Regional Manager.

(b) The Operating Managers shall, if the need arises, inform all third persons with whom they enter into such transactions that such transactions are being carried on, under the authority of the Government and the company, in accordance with customary procedures and policies, that the company remains subject to the usual methods of enforcement of its obligations, and that the Government expects that the acts and agreements of the company will be accorded the same consideration and effect as in the absence of Government control.

§ 603.23 *Employment*—(a) *Working conditions.* In accordance with Executive Order No. 9340, the customary working conditions shall be maintained in all mines.

(b) *Collective bargaining.* In accordance with the terms of Executive Order No. 9340, the customary machinery for the adjustment of workers' grievances shall be maintained in all mines and the right of the workers shall be recognized to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective activities for the purpose of collective bargaining or other

mutual aid or protection, provided that such concerted activities do not interfere with the operation of the mine.

(c) *Employment benefits.* All benefits enjoyed by employees of the mine under private control, including State and Federal insurance payments and benefits, workmen's compensation coverage, and group insurance, and all arrangements governing the payment of wages, including war bond purchase plans and the check-off of union dues, shall be continued.

(d) *Personnel.* Operating Managers shall use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but they shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, they shall communicate with the appropriate Regional Manager for transmission of said request to the proper officials.

(1) All personnel of the mines, both officers and employees, shall be considered as called upon by Executive Order No. 9340 to serve the Government of the United States, but nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment.

§ 603.24 *Application of Federal and State Laws.* (a) The mining companies, their personnel and their property are deemed to remain subject during the period of Government control to all Federal and State laws and to actions, orders, and proceedings of all Federal and State courts and administrative agencies. The companies are expected to meet all Federal, State and local taxes, contributions, and assessments in the customary manner.

(b) The mining companies are deemed to remain subject to suit as heretofore. However, no Operating Manager or Regional Manager is authorized to bring suit, accept service, or enter any legal proceeding, on behalf of the United States without specific direction from the Administrator. Information as to the pendency, necessity, or probability of any legal proceeding which casts in question any right of the United States should be promptly transmitted by the Operating Manager to the Regional Manager and by the latter officer to the Administrator, with appropriate recommendations concerning the assignment of legal counsel if such assignment is indicated.

(c) The possessory interest of the United States in the properties of the companies is deemed to be protected by the criminal laws protecting United States property.

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Brief for the U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES, PETITIONER

v.

PEWEE COAL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 41-47) is reported at 115 C. Cls. 626.

JURISDICTION

The judgment of the Court of Claims was entered on February 6, 1950 (R. 48). A motion by the United States for a new trial, seasonably filed, was denied on April 3, 1950 (R. 48). The petition for a writ of certiorari was filed on June 30, 1950 and was granted on October 9, 1950 (R. 49). The jurisdiction of this Court rests upon 28 U.S.C. 1255.

QUESTIONS PRESENTED

In the spring of 1943, a wage dispute developed between the operators of the nation's bituminous coal mines, including respondent Pewee Coal Company, Inc., and the United Mine Workers of America, representing the miners. The President, by Executive Order, authorized the assumption of federal control over the coal mines solely for the purpose of putting an end to the miners' work stoppages, since the continued operation of the coal mines was deemed essential to the successful prosecution of the war. The Government's control was not intended to, nor did it in fact, interfere with the normal operations of Pewee's business, and its intervention had the effect of stopping strikes which might well have been ruinous not only to the nation generally but to the coal mine operators. The questions presented are:

1. Whether the Government's intervention resulted in a temporary taking of Pewee's coal mine so as to entitle it to just compensation under the Fifth Amendment.

2. Whether, if there was such a taking, Pewee is entitled to any compensation, since no actual loss has been shown, and in any event it received substantial benefits from the Government's actions, far outweighing any losses it may have incurred as a result thereof.

REGULATIONS INVOLVED

The Coal Mines Regulations, and certain other pertinent materials are set forth in the Appendix, *infra*, pp. 96-137.

STATEMENT

This is a suit for just compensation under the Fifth Amendment (R. 2) for the alleged taking by the Government of Pewee's coal mine, pursuant to Executive Order No. 9340, issued by the President on May 1, 1943, in an effort to avert a nation-wide strike of the coal miners. The Court of Claims held that Pewee's mine had been taken and awarded as just compensation $2,241.26, the amount of increased compensation directed to be paid to the miners during the period of the "taking" in accordance with a War Labor Board (WLB) directive. The facts here pertinent—as found by the Court of Claims—follow:

A. *The work stoppages and Government intervention:* Pewee Coal Company,[1] a Tennessee corporation engaged in the business of mining and

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[1] Pewee was organized in August 1939 with its principal offices in Knoxville (R. 3). Its coal mine is in the Cumberland Mountains about 50 miles northwest of Knoxville on property which it leased on November 28, 1939, for a period of 40 years with an option to renew for a further term of 30 years (R. 3). The mine was first opened and developed in 1940; it passed from the development state to production in the early part of 1941 (R. 4). Thereafter, it continuously produced coal, except when its miners were out on strike, until the spring of 1944, when the mine was abandoned because the coal could not be mined profitably (*infra*, fn. 15, p. 16) (R. 39-40).

marketing bituminous coal, is a member of the Southern Appalachian Coal Operators' Association (R. 3-4). Its 150 miners are members of District 19, United Mine Workers of America (UMWA) (R. 4). When the United States entered World War II, the Association and UMWA were parties to various contracts expiring on March 31, 1943, which governed the terms and conditions of employment at, among others, Pewee's Mine (R. 4-5).[2]

At the contract-renewal negotiations which got under way in March 1943, UMWA's president, John L. Lewis, attacked the WLB's "Little Steel" formula[3] as unjustified in view of rising living

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[2] The governing contracts were: (1) an agreement of July 5, 1941, known as the "Southern Wage Agreement", (2) a subsidiary agreement of October 23, 1941, known as the "Southern Appalachian District Agreement," and (3) a further agreement of February 11, 1943, known as the "Six Day Supplemental Agreement" (R. 4-5). This last contract authorized the six-day work week in the industry and forced Pewee to discontinue its practice of avoiding overtime pay while working the mine six days a week by rotating the men, and instead required it to offer work on a straight five or six-day basis. To avoid the production loss entailed in the shorter work week, Pewee elected to incur the extra cost of a six-day schedule in February, 1943 (R. 23-24).

[3] The War Labor Board was created January 12, 1942, by Executive Order No. 9017 (7 Fed. Reg. 237) for the peaceful determination of labor disputes during the war period whenever there was a failure to reach agreement through collective bargaining. Its creation was an outgrowth of the national "no-strike" agreement which the President obtained from American Labor leaders, including John L. Lewis, shortly after Pearl Harbor.

The so-called "Little Steel" formula was promulgated in April 1942 and permitted workers, in general, to receive an increase of up to 15% of their January 1, 1943 pay. *Little Steel Companies*, 1 War Lab. Rep. 325.

costs, and sought, as part of his wage demands, a wage increase of $2.00 per day and a minimum wage of $8.00 per day, which the operators rejected (R. 5). The operators' proposal of a thirty-day extension (from April 1, 1943) of the existing contract was agreed to by the miners upon the request of the President, to whom the operators had appealed to intervene (R. 5-7). On April 9, the southern operators, in accordance with their earlier suggestions (R. 5), officially asked WLB to assume jurisdiction over the dispute and on April 12 made a similar request to the President (R. 6-7).[4] On April 22, the issues were certified to WLB, which held a hearing in which the operators but not the miners participated; the UMWA refused to submit the miners' case to what it deemed a "circumscribed" WLB (*supra*, pp. 4-5) (R. 7-8). Concurrently, a walkout of the miners started which, despite the President's appeal to the miners' patriotism, became complete on April 30 (R. 7-9).

On May 1, 1943, the President issued Executive Order No. 9340 (8 Fed. Reg. 5695) authorizing and directing the Secretary of the Interior "* * *

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[4] On April 8, 1943, the President issued his so-called "hold-the-line" Executive Order, No. 9328 (8 F. R. 4681), directing, *inter alia*, that the several government agencies charged with the stabilization of wages and prices authorize no further wage or salary increases except those which were necessary to correct substandards of living and were within the framework of the "Little Steel" formula; that no increases in the ceiling prices of commodities be authorized except to the minimum extent permitted by law; and that excessively high prices be reduced.

to take immediate possession, so far as may be necessary or desirable" of the struck mines (*infra*, (p. 8) (R. 10-11). Later the same day, the Secretary of the Interior issued his "Order for Taking Possession" (*infra*, pp. 8-10) (R. 12-13).[5] The following day, Mr. Lewis acceded to the Secretary's request and announced a two-week truce (R. 15) which was subsequently extended to May 31, 1943 (R. 16).

On May 25, after further hearings, at which a WLB official represented the miners' interests, WLB rendered its preliminary decision in which it rejected the bulk of the miners' demands, but approved, as of April 1, 1943, the demands that a $30 increase in annual vacation pay be granted and that the operators bear the cost of occupational charges, such as those for lamps furnished the miners (R. 16).[6] The Board's opinion also indicated that the operators and UMWA should resume negotiations on the demands for a guaranteed six-day week and portal-to-portal pay (R. 16).

The negotiations as to a guaranteed six-day work week and portal pay, which were resumed at WLB's suggestion, soon became deadlocked (R.

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[5] The order included all of the approximately 2,850 mines whose output exceeded 50 tons a day and whose aggregate tonnage accounted for about 95% of the total bituminous coal production, together with all of the so-called "rail" mines, regardless of size (R. 12).

[6] 8 War Lab. Rep. 502. UMWA's demands rejected by WLB included, *inter alia*, a $2.00 a day wage increase, double pay for Sunday work, a guaranteed work-year of 52 weeks.

16). A second general strike started on June 1 but was terminated at the President's request on June 7 (Pewee's miners returned June 9) under a truce until June 21 (R. 16-17). After further hearings, in which UMWA still refused to participate, WLB, on June 18, denied UMWA's demands and in substance extended the 1941-1943 agreement (*supra*, fn. 2, p. 4), as modified by it on May 25 (*supra*, p. 6), unless changed by mutual agreement (R. 17).[7]

A third general strike started on June 21 (R. 17), and despite UMWA's instructions to the miners, at Mr. Ickes' request, to resume work under the Government until October 31, 1943, with the understanding that the arrangement would "automatically terminate if government control is vacated" before then, many miners remained idle and Pewee's men stayed out until July 6 (R. 17). Upon the return of the men, both the President and Secretary Ickes stated that control of the mines would be terminated within 60 days after attaining full productivity.[8] There were no more work stoppages in the period prior to the government's re-

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[7] 9 War Lab. Rep. 112. WLB denied the portal-pay claim as beyond its jurisdiction.

[8] These statements were made in accordance with Section 3 of the War Labor Disputes Act (57 Stat. 163, 164, 50 U. S. C. App. 309), which Congress enacted on June 25, 1943, over the President's veto, and which provided that "any plant, mine or facility" theretofore or thereafter taken by the United States should be returned "as soon as practicable but in no event more than sixty days after the restoration of the productive efficiency thereof."

linquishment of control of Pewee's mine on October 12, 1943 (*infra*, pp. 15-16).

B. *The Government control of Pewee's mine:*

1. The President's Executive Order No. 9340 of May 1, 1943 (8 Fed. Reg. 5695) (*supra*, pp. 5-6), authorized and directed Secretary of the Interior Ickes (R. 10):

> * * * to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.
>
> In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

In his "Order for Taking Possession" (8 Fed. Reg. 5767), also issued on May 1, 1943 (*supra*, p. 6), Secretary Ickes stated (R. 12-13):

> * * * I hereby * * * take possession of each such mine including any and all real and

personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines and the distribution and sale of its products, for operation by the United States in furtherance of the prosecution of the war.

The president of each company (or its chief executive officer) * * * is hereby and until further notice designated operating manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to do all things necessary and appropriate for the operation of the mine, and for the distribution and sale of the product thereof.

All of the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

* * * * *

The operating manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons

in possession of funds and properties due and owing to the company.

* * * * *

On the same day, Mr. Ickes issued an order designating the eleven regional managers of the Bituminous Coal Division, Department of the Interior, as regional bituminous coal managers, and setting forth their duties and authority (R. 13-15).[9]

2. "However," the Court of Claims found, "no control over [Pewee's] operations was in fact exercised," except in regard to the increased employee benefits awarded by WLB (*supra*, p. 6; *infra*, pp. 12-13, 16) (R. 15). The company's "management and personnel performed their customary functions and duties in the regular and normal course of its business; no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner. [Respondent's] mining operations subsequent to May 1, 1943, are not shown to have been in any respect different because of Government control." (R. 40-41).

3. The only actions taken by the federal authorities with respect to Pewee's mine were as follows:[10]

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[9] Secretary Ickes, also on May 1, delegated his authority under Executive Order No. 9340 to himself as Administrator, and to the Deputy Administrator of the Solid Fuels Administration for War created by Executive Order No. 9332 (8 Fed. Reg. 5355) (R. 13).

[10] Neither party has challenged the validity of these particular actions, the Executive Order, or the Secretary's general action under the Order.

a. *Appointment of respondent's president as operating manager:* On May 1, Secretary Ickes telegraphed the chief executive officer of each mine to indicate his willingness to serve as Operating Manager (R. 18-19). In Pewee's case, the mine superintendent accepted in the absence of the company's president, raised the American flag at the mine, and carried out the other instructions contained in the telegram (R. 19). Subsequently, when the Government called his attention to the fact that no acceptance had been received from him as chief executive officer, Pewee's president promptly telegraphed his own acceptance and confirmed that of the superintendent (R. 19). On May 12, Secretary Ickes sent to the chief executive officer of each mining company, including Pewee, a certificate embodying formal instructions and appointment as Operating Manager for the United States (R. 19-21); on May 19, he promulgated "Regulations for the Operation of Coal Mines under Government Control" (8 Fed. Reg. 6655). (R. 21).[11]

b. *Placards, posters, and booklets:* On May 5 and 6, the Operating Managers were furnished (1) placards carrying the American flag, the caption "United States Property," and the text of Secretary Ickes' "Order For Taking Possession,"

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[11] The provisions of the Certificate of Appointment and of the Coal Mine Regulations are set out in the Appendix, *infra*, pp. 96-137.

(2) other posters carrying the flag and excerpts from the President's radio address of May 2, appealing to the miners "to heed the clear call to duty", and (3) booklets containing the full text of the May 2 appeal and extracts from Executive Order 9340 (R. 21-22). As instructed, Pewee's officers put up the posters and placards on the company property and at various places in the mining towns, and distributed the booklets to the miners (R. 22).

c. *Compliance with OPA regulations and safety laws:* As part of their contention that living costs had risen disproportionately to wages, the miners claimed that the company stores were disregarding OPA price ceilings (R. 22). On May 3, Secretary Ickes directed that mine stores comply with these regulations (R. 22). Shortly thereafter, the Secretary conducted a survey of company stores and commissaries to determine their costs and selling prices (R. 22). Pewee furnished certain information in regard thereto as requested, and in addition advised the Secretary that it would "carefully follow" the May 3 directive (R. 22). Also, about 2 months later, Secretary Ickes, in conjunction with his campaign to reduce accidents in the coal fields, instructed the mines to operate in full compliance with state and federal safety laws and regulations (R. 22).

d. *Compliance with WLB order:* On June 7, 1943, concurrently with the return of the miners to work after the second general strike (*supra*, p.

7), the Solid Fuels Administration instructed the Operating Managers to carry into effect WLB's decision of May 25 in regard to increased vacation compensation and refund of occupational charges (*supra*, p. 6), stating that in all other respects the terms and conditions of employment would continue to be those which obtained under the old contracts (R. 23). These were the terms of employment throughout the remainder of the control period (R. 23). On or about June 30, Pewee made the increased vacation payments at a cost of $1,890 over what the old contract would have required, and refunded $351.26 for lamp rentals previously collected (R. 23).

e. *Continuance of six-day week:* As stated above, Pewee had elected, prior to federal control, to incur the extra cost of a six-day week work schedule, as authorized by the February 11, 1943 amendment of the wage contracts (*supra*, fn. 2, p. 4) (R. 23-24). Although the schedule did not result in the anticipated production, Pewee in March 1943 decided to remain on that schedule (R. 24). On May 3, Secretary Ickes directed all mines to operate on the six-day week, stating that OPA had recently granted coal price increases to cover that operation and he intended to recommend rescission thereof as to any mine that failed to comply (R. 23). On two occasions during May, Pewee informed the Solid Fuels Administration that it intended to continue the six-day week "unless con-

ditions beyond our control, such as car shortage, etc., make this impossible" (R. 24).[12]

f. *Furnishing of reports:* Prior to government control, the Solid Fuels Administration, in furtherance of its supply and distribution functions under Executive Order 9332 (3 CFR, Cum. Supp. (1943), p. 1270),[13] had asked each bituminous coal producer to file a weekly card report of its production and running time (R. 24). On May 12, 1943, the mines were sent a form memorandum requesting prompt submission of these reports so that the Solid Fuels Administration would be informed as to the availability of bituminous coal for war needs. (R. 24-25). In order to keep the Government informed regarding work stoppages, their causes and effect on production, the Operating Managers were instructed, beginning May 17, to make daily reports of tonnage and labor force of the previous day, together with figures which would reflect whether the situation was normal (R. 25). In Pewee's area, this information was collected by telephone by the Government's local representative who then transmitted the results to the regional office (R. 25). These calls were made at the ex-

[12] The amendment of February 11, 1943, also authorized holiday work at time and a half, if consented to by the parties locally (R. 24). While the Government asked the mines to maintain operations on 3 holidays during the period here involved, Pewee was affected only by the request in regard to work on Labor Day and the proof does not reveal whether its men worked on that day (R. 24).

[13] "Establishing the Solid Fuels Administration for War," issued April 19, 1943.

pense of the mines, and in Pewee's case, because of its proximity to the points to and from which they were made, the calls involved a cost of approximately 60 cents a day (R. 25).

g. *Release of the mine:* In accordance with his earlier statement (*supra*, p. 7), Secretary Ickes, on July 29, instructed the Operating Managers to furnish information upon which he could make a determination as to the release of their mines (R. 26). In response thereto, Pewee's president wrote on August 6 (R. 26-27):

> * * * in my opinion the Government should continue active control of the mines, if not all mines, certainly mines such as ours whose finances are in none too good condition if and until a new wage contract is negotiated since anything like a $1.25 per day wage increase retroactive to April 1st would completely bankrupt such mining companies.[14]

And on October 4, in response to further requests, respondent's president sent in the requested tonnage figures, with his opinion that (R. 27):

> * * * the productive efficiency at this mine has not been restored and as indicated in other communications our tonnage continues considerably off on account of inefficiency, absenteeism, unfavorable operating conditions, etc.

[14] In the latter part of July, 1943, UMWA signed a contract with a segment of the industry, to apply retroactively to April 1, 1943, which provided for this $1.25 payment and certain other benefits for the miners. 10 War Labor Rep. 684, 770.

Meanwhile, beginning on August 20, Secretary Ickes, on the basis of figures submitted, continued to release mines, until October 12 when he promulgated an omnibus order releasing all remaining mines including Pewee (R. 25-26).

C. *Pewee's loss during the period of federal control:* It was agreed, and the court found, that respondent suffered a net loss, during the period of Federal control, of $36,128.96 (R. 40), which it claimed as the measure of recovery. The court found (R. 40), however, that the loss was not attributable to any act of the Government, except to the extent of the sum of $2,241.26, which was paid by respondent to its employees as a result of the WLB decision (*supra*, pp. 6, 10, 12-13).[15] The court also found that "no changes were required or made in [respondent's] internal operating meth-

[15] Specifically, the court found that Pewee's tonnage was seriously reduced subsequent to May 1, 1943, by underground physical conditions due to (1) the use of the unconventional method of working the mine "on the advance" rather than "on the retreat," and (2) the taking of excessive amounts of coal from certain of the pillars and room walls, thus weakening the supports and setting in motion a gradual shifting of the mountain top above the mine (R. 30). This movement or "squeeze" finally manifested itself in May 1943, with the result that the roof began collapsing in part of the mine (R. 30-31). Also in July 1943, the mine's main entry was driven into the initial stages of a "fault" or low-coal area (R. 31). After numerous conferences among Pewee's officers (in which government officials did not participate) it was decided to continue trying to work the mine (R. 32-33). But since there was no indication that the fault would disappear, it was decided temporarily to abandon the mine in January 1944 (R. 34, 39). The mine was permanently abandoned a few months thereafter (R. 39).

ods," and its "mining operations subsequent to May 1, 1943 are not shown to have been in any respect different because of Government control" (R. 41).

In its opinion (R. 41-47), the Court of Claims held, first, that "the Government did in fact, as well as in name, take possession of [Pewee's] mine," and that this was a taking under the Fifth Amendment, entitling respondent to just compensation (R. 44-45). Secondly, it refused to award as part of just compensation the major part of the $36,128.96 loss suffered by Pewee during the period of Government control, on the ground that it was not attributable to any act of the Government (R. 46-47).[16] The court, however, referring to *Wheelock Bros., Inc.* v. *United States*, C. Cls. No. 46982 (Nos. 169 and 177, this Term), which it decided on the same day, held that the increased compensation amounting to $2,241.26 (*supra*, p. 12-13, 16) which Secretary Ickes had directed to be paid in accordance with WLB's directive was an extra expense occasioned by the Government's action,

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[16] The court said (R. 46):

> It is not necessary for us to determine what caused the loss, if it is not shown that the Government caused it, but the findings indicate that the loss was caused, not by the Government's seizure, but by bad mining operations, and by reason of the fact that during this period they ran into a "fault" in the coal seam which made operations unprofitable, and, in fact, later caused the abandonment of the mine.
>
> When this fault was discovered [Pewee] made its own determination as to whether or not to continue operations in an effort to get through the fault, without any counsel, advice or directions on the part of [the Government].

and entered its judgment for that amount (R. 48). Judge Madden dissented (R. 47-48).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that respondent's coal mine had been taken within the meaning of the Fifth Amendment.

2. In holding that respondent was entitled to recover, as a loss occasioned by the Government's actions, the amount of increased wages it was required to pay in accordance with WLB's award.

3. In entering judgment for respondent.

SUMMARY OF ARGUMENT

The Government's position is twofold:—First, respondent's property was not taken in the constitutional sense, and any damage it may have suffered through the take-over of its mining business was the non-compensable consequence of unchallenged regulatory action. Secondly, even if a technical taking occurred, respondent is not entitled to compensation because it suffered no loss by virtue of the take-over.

I

A. Necessary elements of all constitutional takings are (1) an authorized intention on the part of the Government officials to take a recognized property interest from the owner and transfer it to the

United States (as in the normal condemnation or requisition case), or (2) in the absence of such intent, a drastic interference with use and possession of private property, of such character and magnitude that it cannot be accomplished without compensation under the Government's non-eminent domain powers (as in the flooding cases). The aim of our argument on the taking issue is to show—on the basis of the purpose and scope of the take-over, the general orders and proclamations issued, and the specific directives given to respondent—that neither of these conditions is fulfilled here.

B. These were the circumstances of the take-over:—The take-over orders and regulations clearly disclose (1) that the "seizure's" sole purpose was to bring an end to the work stoppage in the coal mining industry, caused by a labor dispute, and to resume the production of coal needed for the war effort, and (2) that there was to be a minimum of interference with the management of the mines. Pursuant to these goals, the Secretary of the Interior appointed respondent's president as Operating Manager, directed him to continue operations, business dealings, and financial transactions as theretofore, and authorized him to take all necessary action (until otherwise ordered). Respondent's officers and employees were to be considered as under private control; it was to remain subject to suit and to all State and Federal laws; all opera-

tions were to be for its own account, until otherwise specifically ordered.

As contemplated by these regulations, no control over respondent's operations was actually exercised, except for directives (1) to comply with the War Labor Board award of increased benefits to the mines, and with OPA price regulations and safety laws, (2) to post placards and distribute booklets, and (3) to furnish certain reports. Respondent's mining operations were not otherwise affected in any way.

C. 1. These unchallenged findings that respondent exercised almost complete control over its operations and business life, together with the terms of the various orders and regulations outlined above, demonstrate that the Government officials never had a present intention to take any property from Pewee and transfer it to the United States. The Executive Order authorized the taking of "possession, *so far as may be necessary or desirable*" (R. 10; italics supplied); and in this case the Secretary took no more than temporary custody for a specific and limited regulatory purpose (*i.e.*, enforcement of the WLB award) leaving title and all other property interests, as well as actual use and possession, in respondent. No attempt was made to employ any of the available eminent domain statutes, and everything that was said in the orders and regulations, or done by the Government during the control period, is fully consist-

ent with the establishment of an operating receivership or conservatorship—a traditional regulatory mechanism. There is no occasion to invoke eminent domain concepts in order to justify or explain the wordings of the take-over orders or the few specific directions issued to respondent.

The President's Executive Order and the Secretary's regulations may have authorized a constitutional taking should control-less-than-taking turn out to be ineffective, but, if so, these orders and regulations were no more than advance warnings or notices of a possible taking, and not present takings in themselves. *Marion & Rye Valley Ry.* v. *United States,* 60 C. Cls. 230, 249-250 (World War I railroad "seizure"). As stated above, it is clear that the Secretary never took any steps to consummate an actual taking of Pewee's mine; such a measure never became "necessary" or "desirable".

2. Official intentions aside, a taking can certainly not be implied from the character or impact of the few actual orders issued by the Government. The directives to comply with safety laws, and to have the company stores abide by OPA price ceilings, added nothing to previous requirements; the same is true of the order to furnish certain reports and information. The six-day week was continued voluntarily and not as a result of the Government directive. The posting of placards and the distribution of booklets helped respondent to resume

operations. The order to comply with the WLB award was fully agreeable to respondent; and, in any event, the directive was merely an additional enforcement device, regulatory in nature, to compel compliance with governmentally established wartime wages.

Not one of these orders, nor all together, resulted in the drastic interference with use and enjoyment of property which is necessary to imply a taking. All of them were well within the Government's regulatory powers, and the degree of regulation they imposed was minor as compared to many other regulatory controls which have been held not to constitute takings. Moreover, a taking cannot be implied where, as here, the claimant plainly gained more from the Government's actions than it lost. *United States* v. *Sponenbarger*, 308 U. S. 256, 266-7.

D. The most appropriate characterization for such a take-over as is involved here and in *Wheelock* (Nos. 169 and 177) is that of operating receivership or conservatorship—non-eminent domain devices long known to American law. Equity courts have employed receiverships to aid enterprises needing outside assistance to continue operations. See, *e.g.*, *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 112. State and federal statutes have provided for governmental conservators to "take possession" of the "business and property" of financial institutions in need of official control. See *e.g.*, *Fahey* v. *Mallonee*, 332 U. S. 245, 250-253. This

receivership analogy, which was publicly advanced in November 1941 during Congressional consideration of take-over legislation, aptly fits the instant "seizures" and every Government action taken during federal control. Recent state take-over statutes are also consistent with this characterization, and there is nothing inconsistent in the terms or the history of the War Labor Disputes Act (passed after the present take-over but prior to that involved in *Wheelock*, Nos. 169 and 177).

E. *United States* v. *United Mine Workers*, 330 U.S. 258, dealt only with the Government-miner relationship for the purposes of the Norris-LaGuardia Act, and expressly did not pass on the relationships of the Government and the operators.

II

Even if there were a technical taking, respondent is not entitled to any compensation, since it has not shown that it suffered a loss. *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280, 282. The Court of Claims allowed the amount of the WLB award, but there is no reason to believe that respondent would not gladly have made these payments if the miners had been willing to return without a "seizure". In addition, the take-over clearly gave respondent a substantial net benefit in allowing it to resume operations without capitulating to the miners' full demands, thus permitting it to save the large overhead costs of a idle mine, as well as

probable increased labor costs which would have been incurred if the strike had ended without federal intervention. Pewee's reluctance to have federal control relinquished reflects its appreciation of the benefits it received.

ARGUMENT

This case, together with *United States* v. *Wheelock Bros., Inc.*, and *Wheelock Bros., Inc.* v. *United States*, Nos. 169, 177, arose out of World War II take-overs by the Government of business enterprises essential to the nation's economy and the war effort, solely for the purpose of averting interruptions in production, actual or threatened, due to work stoppages by employees because of wage disputes with their employers. The suits are by the owners or operators of these business enterprises to recover compensation asserted to be due them as a result of the take-overs. The Court of Claims held that they were entitled to judgment against the United States on the ground that the "seizure" of the business enterprises resulted in takings of property for which the Fifth Amendment prescribes the payment of just compensation. The court fixed as the measure of this compensation the increase in wage benefits paid, by direction of the Government, to the employees during the period of federal control, in accordance with an award of the War Labor Board.

The judgments of the Court of Claims, so imposing liability on the Government, rest on doubly

unsound footings. Point I of our Argument deals with the Court's error in holding that there was a Fifth Amendment taking.[17] In Point II, we shall show that, even if there were a technical taking, Pewee was not entitled to any compensation since it suffered no over-all damages.

I

Neither Respondent's Coal Mine nor Its Business Was Taken Within the Meaning of the Fifth Amendment So as to Entitle It to Just Compensation

The Government's principal contention is that there was no taking of respondent's property or business within the meaning of the Fifth Amendment, and that it therefore has no claim to the just compensation which the Constitution requires to be made for such takings. Our effort will be to show, first, that—considering the Government's purpose, the scope and nature of the interference with respondent's business and property, the requirements imposed upon it, as well as the formal documents issued during the take-over—the necessary elements of a constitutional "taking" of "private property" cannot be said to be present here; and, secondly, that what the Government did was no more than an

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[17] We are filing separate briefs in *Pewee* (No. 168) and *Wheelock* (Nos. 169 and 177) in order to avoid confusion, since although the basic questions presented in both cases are the same, the suits arise out of different take-overs, each of which has its own complex of facts.

The present brief contains the main argument on the taking question, and the *Wheelock* brief the main argument on the issue of damages.

exercise of its regulatory powers, which can best be assimilated to the concept of an operating receivership or governmental conservatorship, long known to our law in other fields.

A. *The elements of a constitutional taking*

Federal eminent domain law recognizes three general classes of constitutional takings. The *first* is the traditional exercise of the eminent domain power, in which Government officials (a) intend to take private property for public purposes, under definite and valid statutory authority, (b) carry out the prescribed formal steps, such as the issuance of a requisition declaration or the filing of a court petition and completion of the judicial condemnation process, and also (c) take possession of, and dominion over, the property.[18] The *second* category differs only in that dispossession of the owner is unnecessary to consummate the taking, as under the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a-f, providing for irrevocable vesting of title in the United States upon the filing of a declaration of taking and deposit of the estimated award, even though possession has not yet been surrendered. In both cases, however, it is the admitted

[18] Examples are condemnations of interests in land under the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257, requisitions of war materials under the wartime requisitioning statute (Act of October 16, 1941, 55 Stat. 742, as amended, 50 U.S.C. App., 1940 ed., Supp. V, 721), and requisitions of merchant vessels under Section 902 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1242.

purpose of the Government officials to divest the owner of some legally recognized property interest and to transfer that interest to the United States.

The *third* class, on the other hand, does not depend upon the intention of the Government officials. Whatever the official intention may be, certain governmental actions entail such an actual invasion of property rights that a constitutional taking must be implied, if the actions are not to be held invalid. See *Penna. Coal Co.* v. *Mahon,* 260 U.S. 393, 413; *Block* v. *Hirsh,* 256 U.S. 135, 155-6; *United States* v. *General Motors Corp.,* 323 U.S. 373, 378; *United States* v. *Dickinson,* 331 U.S. 745, 748.[19] But though subjective purpose to "take" is unnecessary in this class, it is an essential prerequisite that the governmental invasion affect a legally recognized "property right", and not merely some other economic interest of the plaintiff's (*United States* v. *Willow River Co.,* 324 U.S. 499, 502; *Bowles* v. *Willingham,* 321 U. S. 503, 517-519), and also that the interference with use or possession be so substantial and of such a character that it cannot be done without compensation under the Federal Government's regulatory and executive

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[19] The prime instance, in federal eminent domain, is the destruction of privately owned land by flooding. *United States* v. *Kansas City Ins. Co.,* 339 U.S. 799, 809-810. See also *United States* v. *Causby,* 328 U.S. 256 (taking by flights of governmental aircraft) and *Portsmouth Co.* v. *United States,* 260 U.S. 327 (repeated firings of projectiles over owner's land).

powers. *Penna. Coal. Co.* v. *Mahon, supra; United States* v. *General Motors Corp., supra; United States* v. *Causby,* 328 U.S. 256, 261-3, 264; *United States* v. *Kansas City Ins. Co.,* 339 U.S. 799, 804-808. Where these factors exist and a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as title, an easement, a servitude, or a leasehold. *United States* v. *Causby; supra; United States* v. *Dickinson,* 331 U.S. 745, 748, 751; *United States* v. *Lynah,* 188 U.S. 445, 470-1.

The temporary take-over of respondent's mine does not fall, in our view, into any of these three categories. As the following summary (*infra,* pp. 29-39) and analysis (*infra,* pp. 39-66) of all the steps taken by the Government will show, there was no present intention on the part of Government officials, at any stage, to acquire for the United States a proprietary interest in respondent's property or business; they did not act under any statute authorizing use of the power of eminent domain; and the documents they issued did not purport to take respondent's property in the constitutional sense. The sole aim was to induce the resumption of coal-mining with as little interference with respondent's property or business as possible. And putting official intention aside, it is likewise plain that what occurred was not such an invasion of a recognized property right, beyond any executive or regulatory

powers granted by the Constitution, that a taking must be inferred from the Government's actions themselves. The interference which did occur was minimal and well within the Federal Government's non-eminent domain powers.

B. *The limited purpose and scope of the take-over of respondent's mining business*

1. The Government's "seizure" of the coal mines, including that owned by respondent, was solely for the purpose of bringing about the resumption and continuation of the production of coal, which was essential to the success of our war effort. Since UMWA, of which the vast majority of the coal miners were members, and the operators had been unable to agree on a contract, the wage dispute had been submitted, after repeated requests by the operators, to WLB. The union had refused to appear before WLB, because in its view WLB could not decide the matter equitably (R. 9), and instead had insisted on dealing directly with the operators. On May 1, 1943, when the President issued Executive Order 9340, taking over the mines, the UMWA was demanding on behalf of the miners substantial wage increases or benefits which the operators had refused to grant. In order to exert pressure upon the operators to accede to their demands, the miners were refusing to go into the mines and produce coal. Since virtually all of the bituminous mines in the country were involved in the wage controversy, the

strike affected practically all of the mines and very little coal was being produced. At the time the President acted, the stockpile of coal was decreasing rapidly, and to permit the test of economic strength between the operators and the miners to run its course would have been disastrous to the country as a whole, since the tremendous war effort in which we were then engaged was dependent upon the availability of coal for the production of munitions and other necessary tools for waging war.

The Government undertook to take over the mines solely in the hope and expectation that the miners, who would not work while the operators remained in full control, would in this period of emergency forego their right to strike and work under the auspices of the Government, notwithstanding their dissatisfaction with the terms and conditions of employment. The President's Executive Order 9340, authorizing the Secretary of the Interior to take "possession" of the mines, makes this limited purpose clear. (R. 10-11). The preamble states that inasmuch as the miner's work stoppage will curtail "vitally needed production in the coal mines directly affecting countless war industries and transportation systems dependent upon such mines * * * it has become necessary for the effective prosecution of the war that the coal mines * * * be taken over * * * in order to protect the interests of the nation at war, and the rights of workers to continue at work * * *" (R.

10). The President accordingly directed the Secretary of the Interior "to take immediate possession * * * of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, * * * and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war * * *" (R. 10). "Possession and operation of any mine or mines" was to be "terminated by the Secretary of the Interior as soon as he determines that possession and operation hereunder are no longer required for the furtherance of the war program" (R. 11).

In connection with this precise limitation of the "seizure's" goal, the Executive Order made it clear that there was to be a minimum of interference with the management of the mines. The Secretary was authorized and directed to take "possession" of the mines only *"so far as may be necessary or desirable"* (R. 10; italics supplied). He was also specifically instructed to "permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order" (R. 10).

2. These twin presidential directives—to take "possession" for a limited purpose only, and to interfere as little as possible with management—were scrupulously followed at all times during the period of federal control, both in the regulations

issued by the Secretary and in the specific Governmental actions undertaken.

a. In temporarily designating, on May 1, 1943, the chief executive officer of each mining company as "Operating Manager for the United States," Secretary Ickes advised him and all other officers and employees to proceed with the performance of "their usual functions and duties in connection with the operation of the mine" and the production, distribution and sale of the product thereof (R. 12-13). This statement was reaffirmed in paragraph (2) of the Certificate of Appointment of Operating Managers (R. 19-21; *infra*, p. 96), issued on or about May 12 to the executive officers, after receipt of their acceptance of appointment. The Certificate goes on to state in Paragraph (5) that the Operating Manager (R. 20; *infra*, p. 97),

> in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines; and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

Paragraph (6) provides (R. 20; *infra*, p. 98):

> The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enter-

> prise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

And Paragraph (11) authorizes the Operating Manager (R. 21; *infra*, p. 99):

> to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States * * *".

b. The Coal Mines Regulations (*infra*, pp. 100-116), which were issued by the Secretary of the Interior on May 19, 1943 (8 Fed. Reg. 6655), and which superseded all prior orders and regulations to the extent that they were inconsistent with the Regulations (Sec. 3; *infra*, p. 101), specifically declared the primary object of Government possession to be "the maintenance of full production of coal for the effective prosecution of the war. All duties and authorities set forth in these regulations are to be construed in the light of this purpose, * * *" (Sec. 4; *infra*, p. 101). Whenever the cooperation of the company and its personnel could

be obtained, "the existing organization of the mining company will be utilized, and the company will continue operation in the regular course of business as a going enterprise, conforming with such directions as the Government may issue" (Sec. 5; *infra*, pp. 101-2). The properties were to be "operated in a manner consistent with the fact that title to the properties remains in the owners thereof and that the Government, having temporarily taken possession or custody, will assert only such rights as are necessary to accomplish the national purpose of continued and maximum production" (Sec. 5; *infra*, p. 102).

The Operating Manager of each of the mines was ordinarily the "officer of the company formerly in charge of operations * * * who will, * * * during the period of Government control act as Operating Manager for the United States, while continuing to serve as an officer and employee of the mining company;" he was removable at the request of the company who could nominate a successor (Sec. 15; *infra*, p. 106). The Operating Manager and the other officers and employees of the company, though serving "in full recognition * * * of [their] responsibilities to the Government and subject to all orders and regulations of the Administrator * * * shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control" (Sec. 16; *infra*, p. 107).

Furthermore, the Operating Manager continued "to be subject to all restrictions and limitations imposed by the company upon his exercise of his authority," and was required to obtain the "consent or concurrence" of the company in respect to action in which such special action is normally required; if the company refused to consent, the action in question could be taken only after report to the Administrator and his specific direction (Sec. 16; *infra*, pp. 107-8). He was to perform for his company the ordinary duties of management in accordance with established policies and practices, so far as consistent with the regulations and the instructions and orders of the Administrator and Regional Managers, and to take action through the ordinary officials and either under his customary title and designation or as Operating Manager (Sec. 17; *infra*, pp. 108-9). Except for extraordinary disbursements and expenditures, "ordinary financial and commercial transactions shall be carried on so far as possible, in accordance with the customary procedures and policies of the mining company" (Sec. 22; *infra*, p. 110). The status of the officers and employees with respect to the company, including that of the Operating Manager, were to continue as under private control; officers and employees were not to be considered employees of the United States (Secs. 16, 23(d); *infra*, pp. 107-8, 111-12). Customary working conditions were to be maintained (Sec. 23(a); *infra*, p. 111). The companies, their personnel and their property,

were "to remain subject during the period of Government control to all Federal and State laws and to actions, orders, and proceedings of all Federal and State courts and administrative agencies";[20] the companies were required to "meet all Federal, State and local taxes, contributions, and assessments in the customary manner"; and "to remain subject to suit as heretofore" (Sec. 24; *infra*, pp. 112-13). Neither the operation of any mine in the possession of the Government, nor the proceeds, earnings or liabilities of such mine were in any event to be for the account or at the risk or expense of the Government, in the absence of a specific written direction or order by the Administrator to that effect. (Sec. 17, as amended; *infra*, pp. 108, 118). There was nothing in the regulations prohibiting a company from going out of business or abandoning a mine—absent a specific directive to the contrary—and a number of mines were actually shut down during federal control (R. 39).[21]

3. These were the regulations under which Pewee's mine was operated during the period of federal control, and though they permitted affirmative

[20] Section 24(c), *infra*, p. 113, provided that "the possessory interest of the United States in the properties of the companies is deemed to be protected by the criminal laws protecting United States property."

[21] In the present case, the Court of Claims found that respondent "made its own determination as to whether to continue or discontinue operations, and this without any direction from the [Government] or even without any consultation with it" (R. 41).

Government intervention in the affairs of the mines which were taken over, it is plain on their face that by themselves they did not constitute such intervention, and that little actual control was contemplated. This expectation was more than fulfilled.

Apart from its requests for information relating to the production and availability of coal which the operators were already required to furnish the Solid Fuels Administrator under Executive Order 9332 (8 Fed. Reg. 5335) (*supra*, pp. 14-15), the actions of the Government during the period of control did not, in fact, go beyond the limited purpose of keeping the miners at work, and dealt almost entirely with matters causing dissatisfaction among them. See *supra*, pp. 10-16. Even this intervention was minimal. The company stores were directed to comply with OPA maximum price regulations, which UMWA, as part of its contention that living costs had risen disproportionately to wages, had alleged these stores were ignoring (R. 22). Safety laws were ordered to be obeyed (R. 22). The operators were also instructed to pay the increased—but substantially lower than sought by the miners—benefits to which the War Labor Board on May 25, 1943 (after the "seizure"), found them to be entitled (R. 23). Booklets exhorting the miners to resume work were distributed, and placards calling attention to the take-over were displayed (R. 21-22).

In all other respects, the operation of the mines, once resumed, continued as before the Government had intervened; the court below specifically found that no other control over respondent's operations was in fact exercised (R. 15) and "[Pewee's] mining operations subsequent to May 1, 1943 [when Executive Order 9340 was issued] are not shown to have been in any respect different because of Government control" (R. 41). "Management and personnel performed their customary functions and duties in the regular and normal course of its business; no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner" (R. 40-41).[22]

4. Finally, it should be noted that federal control was quickly terminated when the limited purpose

[22] In its opinion, the court below stated (R. 41):

> When the Government took possession it appointed [Pewee's] president as the Operating Manager of the business and instructed him to continue to operate the mine and to sell coal as theretofore, unless otherwise directed. [Pewee] continued operations without any interference on the part of the Government, except in one respect, to be mentioned later, [i.e., payment of the increased wage benefits granted by the WLB]. [Pewee] determined the method of operation, determined whether to continue operations in this place or that, or to discontinue them altogether. [Pewee] sold its coal to whom it pleased and at whatever price it could get for it. It collected for coal sold and put the money in its own treasury.
>
> It did all this without let or hindrance from the Government. It operated its business precisely as it had before the Government took possession of it, except in the one instance referred to above. However, it was at all times subject to Government control and direction.

of the "seizure" was regarded as having been achieved. Beginning on August 16, 1943, the Coal Mines Administration circularized the Operating Managers for information upon which a determination could be made as to the release of their mines, *i.e.*, whether productive efficiency had been restored to the level prevailing prior to May 1, 1943 (R. 25). On the basis of information thus furnished, 58 mines were released on August 20 and 23, and 370 mines were released on September 4 (R. 25). Controls over the remaining mines were terminated on October 12 by an omnibus order, "in accordance with the provisions of the War Labor Disputes Act" (R. 25), *i.e.*, within sixty days after attaining full productivity. Pewee was far from anxious to have federal control relinquished; it appears to have sought an extension rather than a termination of the take-over. See *supra*, pp. 15-16; *infra*, pp. 61-62, 92-93.

C. *The elements of a constitutional taking are not present in this case.*

Viewed in the light of this limited purpose and restricted intervention with actual management and operation, the Government's "seizure" of Pewee's mine does not fit into any of the categories of a constitutional "taking" of "property".

1. *There was no intention to take:* In the first place, the narrow purpose of the take-over, the terms of the Executive Order and the subsidiary

regulations, as well as the limited character of the Government's actions, all indicate that there was no present intention on the part of the Government officials, at any time during the control period, to transfer a property interest from the respondent to the United States.[23]

a. This is certainly not a case like *United States* v. *Westinghouse Co.*, 339 U. S. 261,[24] in which the United States avowedly took a recognized property interest for a temporary period (*e.g.* a leasehold), ousted the occupant from possession, and proceeded to use the premises for its own purposes. Here, it is undeniable that the Government never expressly announced that it was taking title to respondent's property or some lesser property interest, and we believe that no such declaration can be implied from words or circumstances. Executive Order 9340 authorizes the taking of "*possession, so far as may be necessary or desirable*" (R. 10; italics supplied). The Secretary's "Order for Taking Possession" undertook to take only "possession" (R. 12), and Section 5(b) of the Coal Mines Regulations specifically provided that "title to the property remains in the owners thereof," the Govern-

[23] We deal expressly, at pp. 83-86, *infra*, with the Court of Claims' conclusion that if an eminent domain taking were not intended the take-over would be a "pretense and sham" and a "fraud" (R. 44-5).

[24] Or *United States* v. *General Motors Co.*, 323 U.S. 373; *United States* v. *Petty Motors Co.*, 327 U.S. 372; *United States* v. *Kimball Laundry*, 338 U.S. 1.

ment "having temporarily taken possession or custody." *Supra*, p. 34; *infra*, p. 102. This taking of formal "possession" or "custody"—for a temporary period, for a limited purpose, and with an express disavowal of the taking of title—is not equivalent to a declaration that a recognized property interest is being transferred to the United States.

b. This is especially clear because the formal taking of "possession" was coupled with the issuance of orders and regulations showing that the Government did not intend to oust the operators from their possession or to take exclusive possession of all or part of the mining business and property to be operated for the account of the Government.[25] On the contrary, the operators, upon the designation of the president or chief executive officer as "Operating Manager," were left in substantially complete possession of the property to operate the mines for their own account. As we have shown in detail, the Certificate of Appointment of Operating Managers and the Coal Mines Regulations permitted the company to continue (1) to enter into and discharge contracts and other obligations in the ordinary way, (2) to serve customers of their own selection, (3) to effect such

[25] Taking physical possession of each mine not only was deemed unnecessary because of the seizure's limited purposes and anticipated short duration, but was a physical impossibility. The Government did not have the experienced personnel necessary to staff the over 2800 mines "seized" under the Executive Order.

financial transactions as they deemed necessary "utilizing any or all funds due or owing or belonging to the company," (4) to collect and retain the revenues from the business,[26] (5) to effect such changes in the plant, equipment, and capital structure as they saw fit, (6) to remain subject to all state laws,[27] and (7) to be amenable to suit as fully as if government control had not intervened. *Supra*, pp. 32-36; *infra*, pp. 96-137. That the normal functions of management were left to the operators is cogently illustrated in the instant case by the respondent's dealing, without any participation by the Government, with the fault and squeeze which hampered its operations during and after the period of federal control (R. 30-39, 46). *Supra*, pp. 16-17.

c. Further evidence that the executive branch did not view the limited take-over of the coal mines for a restricted purpose as in the nature of a Fifth Amendment taking is the failure to rely on any federal statute implementing the eminent domain power. At the time of the "seizure", Title II of the Second War Powers Act (56 Stat. 176, 177)

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[26] If Pewee's property had been taker, its revenues would have belonged to the Government. *E. I. duPont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U.S. 163, 185. Pewee did not, however, treat the revenues from its business as being received for the Government's account nor was it required to do so.

[27] This, of course, was incompatible with a taking, since state laws would have been inapplicable to federal property. *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U.S. 135; *Missouri, Pacific Railroad Co.* v. *Ault*, 256 U.S. 554; *North Carolina Railroad Co.* v. *Lee*, 260 U.S. 16.

was in effect, empowering the departments and agencies of the Government, upon authorization by the President, "to acquire by condemnation, any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military, naval, or other war purposes." This statute authorized temporary takings of "interests in realty normally purchased by private persons". *United States* v. *Westinghouse*, 339 U. S. 261, 262. Nevertheless, the President's authorization to take possession of the coal mines nowhere invoked this or any other statute pertaining to the exercise of the Government's eminent domain power, but, rather, relied generally upon his powers "as President of the United States and Commander-in-Chief of the Army and Navy." (R. 10).[28]

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[28] The pertinence of this provision of the Second War Powers Act, as well as of the concepts of eminent domain, to the coal mine take-overs was specifically questioned in Congress, though there was some difference of views. Senator Connally, the principal proponent of the "seizure" provision which ultimately became Section 3 of the War Labor Disputes Act [which was enacted subsequent to (on June 25, 1943), and in light of, the take-over of the coal mines here involved] said in explanation of his proposal (89 Cong. Rec. 3807) that "there is no explicit and definite provision in any statutory enactment authorizing the taking over of plants on account of labor disturbances. * * * The Second War Powers Act carries a clause with regard to condemnation, under which the Government may take over temporarily any plant or property, but even that does not carry the specific authority". Senator Tydings subsequently proposed an amendment to the bill which became the War Labor Disputes Act for the express purpose of confirming and validating the President's "seizure" of the coal mines (89 Cong. Rec. 3989) since, as Senator Tydings put it, "no one has put his finger on the particular power which authorized the President to seize the coal mines."

d. Added to this omission to invoke condemnation authority must be the significant fact that the close similarity of a take-over for the purpose of ending a labor dispute to the traditional operating receivership or conservatorship—a regulatory rather than an eminent domain mechanism—was then prominent in the thinking of persons in public life. See the discussion *infra*, pp. 77-81. All the general orders, declarations, and regulations issued with respect to the take-

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89 Cong. Rec. 3989. During the debate on that proposal, Senator Taft referred to Title II of the Second War Powers Act as clearly authorizing the President's action. 89 Cong. Rec. 3989, 3991. Senator Tydings, however, disputed the applicability of Title II and stated (89 Cong. Rec. 3990) that the purpose of the Second War Powers Act was "to acquire property which the Government intended to use" but that the take-over of the coal mines "was not to acquire property which the Government intended to use; it was to take over property temporarily, merely as a law and order proposition, until the property seized could be employed in the war effort." Senator Tydings also said (89 Cong. Rec. 3990) that "the Government today is not owning any of these mines, it is not attempting to own them. Already by Executive order they have been restored to their owners. The owners have been told to operate them under the jurisdiction of the National Government. * * * [The Senator from Ohio] knows and I know that there will be no condemnation proceedings filed in this case. He knows and I know that the Government does not want to acquire the coal mines. He knows and I know that the only purpose of the Government's being in the mines now is to establish law and order, so that work may be resumed. * * *"

While Senator Tydings' amendment to the War Labor Disputes bill was rejected (89 Cong. Rec. 3992), the reason was not that it was believed that the President already had the statutory power under the Second War Powers Act, as urged by Senator Taft, but rather that it was thought that enactment of the amendment might give rise to the impression that the President had exceeded his authority. 89 Cong. Rec. 3992 (Senators Connally and Barkley).

over (*supra*, pp. 8-10, 30-6), as well as all the specific actions undertaken (*supra*, pp. 10-16, 36-9; *infra*, pp. 55-62) are fully consistent with this receivership concept. In particular, as we point out more fully below at pp. 71-2, 75-7, each of the few compulsory orders issued by the Government—ordering compliance with the WLB award, as well as with OPA regulations and safety laws; requiring the furnishing of reports—is the type of command which a receiver or conservator could properly promulgate.[29]

For the same reason, it cannot be said that an intention to take is shown by the legend "United States Property" on the placards ordered to be displayed at the mine (R. 21-22) (*supra*, pp. 11-12). This legend would certainly be entirely appropriate if the United States was acting as receiver or conservator of the mine and its business, in aid of the war effort.[30] It would even not be inapt if the Government were merely exercising its war powers to preserve order in the coal mines and to induce the miners to return by seeing that they were granted certain benefits, and chose to consider itself, in its

[29] Even if one puts the receivership analogy aside, these directives as to employee benefits, reports, and compliance with statutes, do not indicate, either by themselves or together with the other circumstances, that the Government intended to exercise its eminent domain powers. See also *infra*, pp. 54-66, 84-5.

[30] The same is true of the provision of the Coal Mines Regulations that the United States' "possessory interest" was "deemed to be protected by the criminal laws protecting United States property". *Infra*, p. 113.

capacity as *parens patriae*, as an official custodian, caretaker, or trustee.

e. It may be true that Executive Order 9340 *authorized* Secretary Ickes to take the mines in the constitutional sense, but it did not authorize or direct that this be done unless it was "necessary or desirable" (R. 10; *supra*, pp. 8, 31). The Secretary's orders and regulations, issued pursuant to the Order, can be read as contemplating the occurrence of such a taking if the Government took certain further steps,[31] but, as we have said (*supra*, pp. 36-7, 40-2, 44-5), it is clear on their face that, in the absence of much more drastic intervention in a company's business than happened here, nothing in those regulations or orders constituted a present "declaration of taking", akin to the formal declaration under the Declaration of Taking Act, 40 U.S.C. 258a-f, which automatically, and without more, passes title to the United States.

If they contemplated eminent domain at all, the Executive Order and the Secretary's orders and regulations constituted no more than formal notification that a taking might occur if that action turned out to be "necessary or desirable", and if

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[31] For instance, the Coal Mines Regulations (*infra*, pp. 102, 107-8, 113-14, 118) contemplated that the existing management might not be utilized (Sections 5, 15(b), 30, 31), that operations might be directed to be for the Government's account (Section 17), and that complete supervision of all operations might be imposed (Section 16).

control-less-than-taking were insufficient. Such advance notice or warning is, of course, not equivalent to the taking itself. *United States* v. *Sponenbarger*, 308 U. S. 256, 267-8; *Danforth* v. *United States*, 308 U. S. 271, 286; *Bauman* v. *Ross*, 167 U. S. 548, 596; *Shoemaker* v. *United States*, 147 U. S. 282, 321; *Willink* v. *United States*, 240 U. S. 572, 579-580.[32]

This was the very core of the decision in *Marion & Rye Valley Ry.* v. *United States*, 60 C. Cls. 230, affirmed, 270 U. S. 280, where in closely analogous circumstances the Court of Claims held that there had been no constitutional taking.[33] In that case, which arose out of Federal control and operation of the railroads during World War I, the President issued a Proclamation in which he announced *inter alia* that "I * * * do hereby * * * take possession, and assume control * * * of * * * every system of transportation" and that "all transportation systems shall conclusively be deemed within the possession and control of [the Director General

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[32] In the ordinary eminent domain proceeding, not under the Declaration of Taking Act, the United States may abandon the attempt to condemn at any time before the actual vesting of title or taking of actual possession, even after judgment confirming the award. *Bauman* v. *Ross*, 167 U.S. 548, 598-9; *Danforth* v. *United States*, 308 U.S. 271, 284.

[33] On appeal, this Court found it unnecessary to pass on this question, since the Court held that "even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss" (270 U. S. at 282). See *infra*, p. 94.

of Railroads] without further act or notice" (60 C. Cls., at 231-234, 232, 234). The Proclamation, moreover, unlike the present Executive Order, expressly provided for the payment of just and reasonable compensation. 60 C. Cls., at 233. The Director General of Railroads issued to the railroads orders reciting that he had "taken possession and assumed control of" the transportation system; that officers, agents and employees of such system "may continue in the performance of their present regular duties"; that accounts of the railroads should be closed as of the beginning date of Federal control and opened as of the next day (60 C. Cls., at 237-238); and that "Every railroad officer and employee is now, in effect, in the service of the United States" (60 C. Cls., at 239). He also ordered a general increase in rates (60 C. Cls., at 241). The Court of Claims found further, as it did here, that (in the words used by this Court in summarizing the findings, 270 U. S. at 282-283):

> [The Director General of Railroads] did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific direction as to its management or operation; and did not at any time interfere in any way with its conduct or activities. The company retained possession and continued in the operation of its railroad throughout the period in question. The railroad was operated during the period exactly as it had been before, without change in the manner, method or pur-

> pose of operation. * * * The character of the traffic remained the same. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of the traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the Government, devoted the net operating income to the company's use.

Based on these findings, the court concluded that there had been no taking, since, it held (60 C. Cls., at 249-250) there was an absence of the evidence necessary

> to show that the use of the property was such that its common and necessary use was so seriously interrupted as to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him from deriving the benefits which would have accrued had the property not been taken. * * * A mere declaration of an intention to take cannot constitute a taking. The proclamation of the President setting forth that on some future day he will take over the property of certain owners does not of itself constitute a taking of the property. There must be some definite act, some positive proceeding by which the property is actually taken and appropriated before the taking can be consummated. It must be such a taking of the property as that the owner is deprived of, or circumscribed in some way, in the use and

enjoyment of his property. If his possession is undisturbed and his property in its value and use is undiminished it cannot be said that there is a taking within the meaning of the Constitution.

By the same token, the orders and regulations issued here—which were similar to but less far-reaching than those in the *Marion & Rye Valley* case—cannot be treated, in themselves, as declarations of taking. At most, they were declarations of an intention to take in the future should the circumstances be deemed to require such a step. As the situation actually developed, however, use of the eminent domain power became unnecessary and undesirable. The few specific regulatory directives issued by the Secretary to respondent (*supra*, pp. 11-15, 37, 44-5; *infra*, pp. 55-66) obviously did not indicate any intention to exercise whatever latent or reserve eminent domain powers he may have had.

f. That governmental orders and regulations of this type did not result in a constitutional taking of the coal operators' property has already been suggested, in other contexts, by a number of lower courts. *Warner Coal Corp.* v. *Constanzo Transportation Co.*, 144 F. 2d 589, 593-4 (C. A. 4), certiorari denied, 323 U. S. 791; *Glen Alden Coal Co.* v. *N. L. R. B.*, 141 F. 2d 47, 51-2 (C. A. 3); *Consagra Coal Co.* v. *Borough of Blakely*, 55 F. Supp. 76 (M.D. Pa.); *Stanton* v. *Ruthbell Coal Co.*, 127

W. Va. 685, 694-698.[34] Thus, in *Warner Coal Corp.* v. *Constanzo Transportation Co., supra*, which was a proceeding against a "seized" coal mine for an adjudication of bankruptcy, the Court of Appeals for the Fourth Circuit rejected the company's contention that since its mine "had been taken over" by the United States, such an adjudication was improper. The court briefly reviewed the Executive Order and the Coal Mine Regulations, and commented (114 F. 2d at 593-594):

> Under this order and regulation there was no interference with the operations of the Coal Company's mines. Its president was named operating manager for the United States and the business proceeded as usual * * *.

And in *Stanton* v. *Ruthbell Coal Co., supra*, an action for wrongful death of a miner which the company sought to defend on the ground that it was not liable since the death occurred during Government control, the West Virginia Supreme Court of Appeals, following a full review of the

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[34] *Jones & Laughlin Steel Corp.* v. *United Mine Workers*, 159 F. 2d 18 (C. A. D. C.), does not hold to the contrary. There, the court, in holding that the owner of the mine could not protest any changes in the terms and conditions of employment established by the Government for the period of the "seizure" (a take-over subsequent to the one involved here), stated that the owner "is privileged at any time to withdraw from participation in the program established [by the Government] and stand on its constitutional right to just compensation," by having the business operated for the Government's account (159 F. 2d, at 20-21).

pertinent orders and regulations, held the defense invalid, and noted (127 W. Va. at 694-695, 698):

> The Regulations, in our opinion, clearly indicate that, except and only if necessary to effect the primary object of Government control, such control would be nominal. * * *
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> * * * in the instant case, where defendant company was operating a coal mine, subject to Government control on defendant's own account and for its own profit, it should not be relieved from liability for the negligence of its officers and agents in the operation of its mine. * * * [35]

g. If, despite all these considerations, it be thought that some sort of compulsory taking was intended by the Government officials, than we urge that the "taking" was not of a "property right" which must be recognized under the Fifth Amendment. The Government took possession only to the extent necessary to provide an additional basis for urging the miners to resume the production of coal

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[35] In the *Stanton* case, as well as *Glen Alden Coal Co.* v. *N. L. R. B.*, *supra*, the courts distinguished the instant situation from the Government's operation of the railroads in World War I by pointing out that there, as was stated in *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554, 557, "the carrier companies were completely separated from the control and management of their systems. Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration'. * * * The railway employees were under its direction and were in no way controlled by their former employers."

and to assure that, during the period of federal control, production would continue. In *United States* v. *United Mine Workers*, 330 U.S. 258, where the Government had not only "seized" the mines but had also entered into the Krug-Lewis Agreement with the miners providing for substantial employee benefits, this Court described the situation as one where "the Government, in order to maintain production and to accomplish the purposes of the seizure, has substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining between the union and the operators." 330 U.S., at 287. If anything was intended to be taken in the constitutional sense, it was only this right of respondent, as an employer, *vis à vis* its employees. But though the operators may have an economic interest in dealing with their miners, "not all economic interests are 'property rights'" (*United States* v. *Willow River Co.*, 324 U.S. 499, 502-3), and the only protected property rights are those "susceptible of pecuniary compensation, within the meaning of the constitution". *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9, 20 (C.C.D. N.J.), appeal dismissed, 140 U. S. 699. Freedom to set all the terms and conditions of employment for one's employees is not an absolute right protected against Government control or supervision, and payment need not be made if a Government agency is established to take over this function, in part, from the

employer. The National Labor Relations and the Fair Labor Standards Acts are proof enough of this proposition. If Congress had established another method for enforcing WLB awards, such as the injunction process or a cease-and-desist order, the employers could certainly not complain of its validity or obtain compensation because of its exercise. See *infra*, p. 58 *et seq.* They should have no greater right because the same regulation is undertaken in the form of a "taking" of their interest in dealing with their employees.[36]

2. *There was no taking implied by law from the government's actions:* The same conclusion must be reached if the Government officials' intention is put aside, and their actions considered alone. Whatever interference there may have been with respondent's property or business during federal control, it is plain that it did not reach the "certain magnitude" which calls for an exercise of the eminent domain power and payment of compensation to sustain it. *Penna. Coal Co.* v. *Mahon*, 260 U.S. 393, 413; cf. *Block* v. *Hirsh*, 256 U.S. 135, 155-6.[37] Detailed examination of the several ac-

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[36] In addition, there is nothing to show that respondent could not have gone out of business, even during the period of federal control, if it preferred to take that step rather than comply with the WLB award. Respondent, of course, was happy to comply. *Supra*, pp. 15-16; *infra*, pp. 61-2, 90-1.

[37] The other leading cases in this Court applying this principle are the flooding cases (e.g., *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 177-181; *United States* v. *Lynah*, 188 U.S. 445, 468-471; *United States* v. *Kansas City Ins. Co.*, 339 U.S.

tions taken by the Government during the "seizure" will demonstrate (a) that those instances of federal intervention which had any effect occasioned only comparatively minor interference, (b) that all the specific directives issued would be constitutionally valid under the Government's noneminent domain powers, and (c) that, on balance, the Federal Government's intervention was beneficial, rather than harmful, to respondent.

a. *The Government's directives occasioned only minor interference or imposed no additional obligations.* Since the Court of Claims has found that no control over respondent's operations was in fact exercised, with the exception of a few directives (R. 15, 40-1), we turn to those specific requirements.[38]

(1). Quite plainly, the lesser directives issued by the Secretary of the Interior were neither intended to, nor did they in fact, substantially interfere with the management and operation of the mines, or impose serious new and additional requirements. The Secretary's "Order for Taking Possession," required the operators to fly the American flag over

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799, 809-811); *Portsmouth Co.* v. *United States*, 260 U.S. 327; and *United States* v. *Causby*, 328 U.S. 256.

[38] Except for the specific directives treated in the following discussion, the terms of the Executive Order, and the Secretary's orders and regulations, imposed no requirements upon respondent, and, obviously, could not, in and of themselves, constitute any interference with respondent's use and possession of its property and business. See also the Government's Brief in *Wheelock*, Nos. 169 and 177, at pp. 39-40.

their property and to post the notice of taking possession on the premises of the mine (R. 12). Subsequently, they were also required to distribute booklets relating to the Government seizure to their employee miners (R. 22). It is difficult to see how these requirements encumbered or interfered, substantially or otherwise, with respondent's mining operations. On the contrary, it would seem that respondent's operations were greatly helped by compliance with these requirements for by apprizing the miners of the government's "seizure", they aided in exercising the desired pressure on the miners to return to the mines.

(2). The directives requiring that company stores reduce their prices to OPA price ceilings (R. 22), and that the management operate in compliance with state and federal safety laws (R. 22), imposed no additional burdens on respondent. The company stores, together with all others engaged in the business of selling, were, prior to the "seizure" and independently of the Secretary's directives, required to conform to the ceiling prices set by OPA. Similarly, the operators were under a duty to comply with the state and federal safety laws. The Secretary's directive in these respects, accordingly, was clearly merely precatory and added nothing to the obligations already imposed on the operators.

(3). The requirement that the Solid Fuels Administration be furnished weekly and (subse-

quently) daily tonnage and labor figures was of a like nature, for, independently of the seizure, the operators were subject to the regulatory powers vested in Secretary Ickes as Solid Fuels Administrator for War under Executive Order 9332 (8 Fed. Reg. 5355), issued April 19, 1943. That order, included, *inter alia,* authority to issue and enforce "directives" with respect to the production and allocation of coal, to recommend OPA revisions of the maximum prices therefor, and to require that the mining companies furnish any information and data needed to effectuate the purpose of the order. Sometime prior to the take-over, the Solid Fuels Administration had requested the operators to send in weekly reports as to production and running time (R. 24). The renewal of this requirement after the "seizure" (R. 24) and the subsequent request that more detailed reports be made daily (R. 25) clearly fell within the ambit of Order 9332 and imposed no additional burden resulting from the "seizure."

(4). Examination of the circumstances relating to the directive with regard to the 6-day week indicates that it exerted no compulsion on respondent. Pewee had been operating on the 6-day week since the summer of 1941 and had elected to continue on that basis, despite the increased cost, in February 1943, when the industry in general shifted to that schedule (R. 24). It was operating on a 6-day week

at the time of Secretary Ickes' directive, and thereafter twice informed the Government that it intended to continue that practice "unless conditions beyond our control * * * make this impossible" (R. 24). Thus, respondent evidenced a firm resolve to continue on the 6-day week, both before and after the Secretary's directive, a resolve which in no way emanated or resulted from the existence of government control.[39]

(5). Finally, the directive of the Secretary of the Interior to the operators, including respondent, that they pay the increased wage benefits to which WLB, by its order of May 25, 1943 (R. 16), found the miners entitled, did not, of itself, result in any drastic new interference with respondent's operations, for even apart from the Secretary's requirement, the operators were under pressure, if not a full-fledged legal obligation, to comply with the WLB's directives. A national no-strike no-lockout policy had been accepted and promulgated in December 1941, and the WLB acted under presidential orders to "finally determine" unresolved labor disputes which might otherwise have caused a disruption of war production. Executive Order 9017, 7 Fed. Reg. 237, 3 CFR, Cum. Supp., p. 1075. It

[39] Although there had been an instruction to keep the company's books and records in such manner that the control period would be separate (R. 21), this instruction apparently amounted to nothing, for Pewee's books and records (as well as its accounts, including bank accounts) were maintained during government control without change, exactly as they had been maintained theretofore (R. 41).

was also endowed, with respect to wages, with the President's authority under the Economic Stabilization Act of October 2, 1942 (56 Stat. 765). See Executive Order 9250, 7 Fed. Reg. 7871, 3 CFR, Cum. Supp., p. 1213. The Board early took the position "that its decisions are directive orders and not recommendations" (Morse, *The National War Labor Board, Its Powers and Duties* (1942) 22 Oreg. L. Rev. 1, 39), and they had a special status and force of their own. See Morse, *op. cit., supra,* at 36-44; Hays, *The National War Labor Board and Collective Bargaining* (1944) 44 Col. L. Rev. 409.

The WLB directives, in fixing wages, thus paralleled in the wage field (though with less compulsive effect) the price ceilings administered by the Office of Price Administration under the Emergency Price Control Act (56 Stat. 23, as amended, 50 U.S.C. App. 901 *et seq.*), which was another phase of the wartime anti-inflation program. It is settled that these maximum prices did not involve a Fifth Amendment taking, but rather constituted valid regulation under the war power. *Bowles* v. *Willingham*, 321 U. S. 503.[40] WLB orders were also akin to the controls over wages and hours of employees exercised by the Government under the Fair Labor Standards Act of 1938 (52 Stat.

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[40] As in the price control situation, an employer certainly had the choice, if he did not want to pay wages in accordance with a WLB's order, to withdraw from business.

1060, as amended, 29 U.S.C. 201 *et seq.*) as well as to the controls over an employer's relations with his workers imposed by virtue of the National Labor Relations Act (49 Stat. 449, as amended, 29 U. S. C. 141 *et seq.*) It is likewise settled that these controls involve no more than regulation under the commerce power. See *United States* v. *Darby*, 312 U. S. 100; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. *A fortiori*, WLB's wage and benefit determination could impose no more than a regulatory burden upon the operators, which burden, in and of itself, plainly did not involve a Fifth Amendment taking.

The Secretary's directive to comply with the WLB's award did not transform this exercise of non-eminent domain powers into a constitutional taking. That directive, together with the "seizure," were sanctions invoked by the Government to secure compliance with WLB's award, comparable to the judicial sanctions which Congress had made available to the agencies charged with the administration of the regulatory statutes cited above. In the case of the WLB, it was thought that, in view of the emergency character of its determinations, judicial sanctions would hinder, rather than aid, the securing of compliance, and consequently it was considered more desirable to leave enforcement to other sanctions.[41] The methods used to obtain

[41] The bill, which was enacted as the War Labor Disputes Act, giving statutory foundation to WLB provided, as it went

compliance with WLB directives consisted primarily of persuasion, "show cause" hearings, withdrawal of benefits and privileges under Executive Order 9370 (8 Fed. Reg. 11463).[42] 1 Termination Report of National War Labor Board, pp. 416-419. As a last resort, WLB could, and in some instances did, refer a non-compliance case to the President or his representative for such action as he might deem appropriate. *Ibid* p. 420. When he deemed it appropriate, the President, as in the instant case, directed the take-over of the plant in order to make sure that WLB's award would be accepted. So viewed, the President's "seizure" in this case and the Secretary's order to pay the increased benefits were simply additional administrative sanctions for securing compliance with WLB's award, and, accordingly, no more involved a "taking" of "pri-

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into conference, for judicial review and enforcement of WLB's orders. This provision was, however, deleted in conference in deference to the request of WLB's chairman, 89 Cong. Rec. 5794-5, 5754-5, 5791, 5812. See 1 Termination Report of National War Labor Board, pp. 58-59.

[42] Executive Order 9370, issued August 16, 1943, authorized the Director of Economic Stabilization to direct the withholding or withdrawal from an employer who did not comply with a WLB award of "any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government" until compliance had been effectuated. The Order also authorized the withholding from non-complying union of "any benefits, privileges or rights accruing to it under the terms or conditions of employment," and directed as to non-complying individuals "the entry of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both." (This Executive Order was construed by the Director of Economic Stabilization to apply only to WLB orders issued pursuant to the War Labor Disputes Act of June 25, 1943. Accordingly, it was inapplicable in *Pewee's* case, but applied to *Wheelock's*.)

vate property" than do the judicial sanctions available to aid other valid regulatory controls which could constitutionally have been employed here if Congress had desired.

Moreover, the facts of the instant take-over demonstrate that far from being an unacceptable burden imposed by the government on respondent, the Secretary's directive to comply with the WLB award was gladly and voluntarily followed. The coal mines were seized because of the refusal of UMWA to comply with, or accept, WLB's procedures and award. The wage dispute between the operators and the miners was submitted to the WLB only after the operators had made repeated requests that the dispute be so handled (R. 5-7). The operators, unlike the miners who refused even to attend, participated actively in the WLB proceedings, both before and after the seizure (R. 7, 16). Not only the procedure but the result met with the operators' approval for the WLB's award was but a small fraction of the aggregate wage demand being pressed by UMWA, which, according to the operators' representatives, amounted to more than $5.00 per day per man. In contrast to the operators, UMWA not only failed to appear before the WLB but initially rejected WLB's award as constituting virtually no settlement at all of its demands, and it finally accepted the award only because of the "seizure" and pressure from the Government. Respondent, on the other hand, was

happy to continue compliance with the award, and even sought continuance of the federal control which required it to comply (R. 26-7). In these circumstances, the Secretary's directive to the operators to pay the increase, which was agreeable to them, can hardly be termed a serious restriction imposed upon them against their will. See also *infra*, pp. 66-8, 89-94.

(6) The foregoing summarizes the ways in which government control affirmatively touched upon Pewee's affairs. Even without considering the Federal Government's established power to impose regulations of this type without compensation, it is plain that the Secretary's directives did not cause any substantial injury to respondent. Not one of them had, or could have had, any serious connection with the common and necessary use of respondent's property (*i.e.*, the production of bituminous coal), nor could any of them, or all of them together, have seriously interrupted that use, served to deprive respondent of its possession, control, and operation of the property, or constituted a direct and immediate interference with the use and enjoyment of its business property, tangible or intangible. On the contrary, the court below specifically found that "[Pewee's] mining operations subsequent to May 1, 1943 are not shown to have been in any respect different because of Government control" (R. 41).

b. *The directives were well within the Government's regulatory powers.* Furthermore, as we have already suggested with respect to the order to comply with the WLB award, it is indisputable that to the extent that these directives had any effect upon respondent they did no more than impose a minor degree of regulation, comparable to, but less severe than, many other instances of federal regulatory control, particularly during wartime. The courts have refused to find a "taking" with respect to governmental controls of a far more drastic nature than anything here involved. For example, federal regulation of the price which a company may charge for its products or service is not a taking (*Morrisdale Coal Co.* v. *United States*, 259 U.S. 188; *Highland* v. *Russell Car Co.*, 279 U.S. 253; *E. I. duPont de Nemours & Co.* v. *Hughes*, 50 F. 2d 821 (C. A. 3); cf. *Tagg Bros.* v. *United States*, 280 U. S. 420; *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 569-570; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392-396), nor is regulation of the rate at which an owner may rent his property, even though it prevents his earning a fair return on the property's value (*Bowles* v. *Willingham*, 321 U. S. 503, 516-517; *Snyder* v. *United States*, 113 C. Cls. 61, certiorari denied, 337 U. S. 931). Similarly, it is not a taking for the Government to restrict the right to earn profits in wartime (*Lichter* v. *United States*, 334 U. S. 742, 787); to deprive an owner of the benefits

of certain valuable property rights (*Omnia Commercial Co.* v. *United States*, 261 U. S. 502; *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467; *Georgia Hardwood Lumber Co.* v. *United States*, 111 C. Cls. 621); to reduce the value of a business by prohibiting the sale of an otherwise lawful commodity (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Mugler* v. *Kansas*, 123 U. S. 623); to cause a company real and substantial damages during wartime by depriving it of materials needed to continue in business (*St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271, certiorari denied, 335 U. S. 815); or to order the company to close down its operation because of war needs (*Oro Fina Consolidated Mines, Inc.* v. *United States*, C. Cls. No. 49486, decided October 2, 1950).

It should also be noted that the coal mining companies were subject to far more comprehensive control under the Bituminous Coal Act of 1937 (50 Stat. 72) than are here involved, and these controls were never regarded as resulting in a Fifth Amendment taking.[43] Under the Bituminous Coal Act, the Government prescribed minimum prices at which coal could be sold. The Government regulated the production practices of the mines in certain respects. It prescribed detailed rules governing the

[43] As pointed out, *supra*, pp. 56-7, the mining companies were, prior to and concurrently with the "seizure," subject to various controls exercised by Secretary Ickes as Solid Fuels Administrator under Executive Order 9332 (8 Fed. Reg. 5355).

marketing of its coal, under which there was surveillance of such matters as the discount and payment terms the mining companies gave their customers. The operators were required to maintain certain records in a specified manner, to file copies of all invoices concurrently as rendered to their customers, and to submit various reports, such as reports showing their monthly costs, tonnage, and realization. Moreover, the mining companies were visited from time to time by a Bituminous Coal Division employee who made a spot check as to compliance. Although an operator could have declined to participate in this regulatory scheme, it would have been subject to the onerous sanction of a 19½ percent tax on its coal sales (violation of the Act and exclusion from the plan on that account brought the same result), as opposed to the cent-a-ton excise tax it paid as a participant.

These instances of federal regulatory control, all of which have been held to fall short of a taking, are far more penetrating than the minor restrictions imposed upon respondent. Likewise, the interference with possession and the controls normally imposed in an operating receivership or conservatorship are more severe and all-inclusive, and such possession and control has never been regarded as constituting a Fifth Amendment taking. See *infra*, pp. 68-86. If respondent suffered injury because of the Secretary's directives, its damage was no greater than that which can be validly inflicted by

these accepted exercises of a government's non-eminent domain powers.

c. *Respondent gained more than it could have lost on account of the Government's actions.* A further significant reason why there was no constitutional taking is that such a taking will not inferred from government action "that does little injury in comparison with far greater benefits conferred." *United States* v. *Sponenbarger*, 308 U.S. 256, 266-7. In the *Sponenbarger* case, a landowner whose lands were to be used as a floodway in connection with a project to control the damage caused by the floodings of the Mississippi River, claimed entitlement to just compensation. The Court noted, however, that other lands of the respondent would be protected as a result of the project and held that in these circumstances the far-reaching benefits which respondent's lands would enjoy under the project precluded a holding that respondent's property had been taken (308 U.S. at 266-267):

> The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner.

Similarly, in the instant case, whatever losses Pewee sustained were more than counter-balanced by the substantial benefits which the Government's actions conferred upon it. The Court of Claims found that the sole expense incurred by respondent as a result of these actions during the 5½ month period of federal control (May 1, 1943, to October 12, 1943) was the increased wage benefits of $2,241.26, or about $15 per miner,[44] paid during that period. More than offsetting this slight expense were the substantial benefits received by respondent as a result of the Government's "seizure" and its specific directives:—*i.e.*, return of the miners to work and ending of a burdensome strike; payment of far less in wages and benefits than the miners' union demanded and would have continued to demand had there been no take-over; continued production of coal; saving of the large costs of maintaining an idle mine. (For more detailed discussion of the benefits gained by respondent, see Point II, *infra*, pp. 89-94). "Under these circumstances, respondent's [property] has not been taken within the meaning of the Fifth Amendment." *United States* v. *Sponenbarger, supra*, at 267.

D. *The take-over was equivalent to an operating receivership or conservatorship.*

That the "seizure" of the coal mines was not a Fifth Amendment taking of private property

[44] Based on the employment of 150 miners. See *supra*, p. 4.

becomes even clearer when it is compared with the operating receiverships or conservatorships which have traditionally been used to keep businesses in operation. The limited purpose for which the Government seized the coal mines, *i.e.*, as a means of bringing about the resumption of coal production after a strike, taken together with the fact that the Government's intervention was limited to employee matters and that in all other respects the mines, once production was resumed, were operated by and for the account of the operators, strongly suggest that the "possession" of the Government was equivalent to that of a receiver or conservator.

1. a. A receiver is frequently appointed to take possession and operate a business enterprise which for various reasons is not in a position to continue operations without outside assistance. See e.g., *Dodge* v. *Woolsey*, 18 How. 331, 341-4; *Saltz* v. *Saltz Bros.*, 84 F. 2d 246 (C.A.D.C.); *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U.S. 208; *In re Cleveland Discount Co.*, 5 F. 2d 846 (N.D.Ohio).[45] This is particularly true where the

[45] The grounds may be, for example, the pressing demands of creditors, a claim by minority stockholders of mismanagement, inability of partners or joint owners to agree upon the business' operations, or serious financial embarrassment. See 1 Clark, *A Treatise on the Law and Practice of Receivers* (2d ed. 1929), Sec. 46(a) (Court Appointing Receiver under General Equitable Powers), Sec. 49 (Rules Governing Appointment of Receiver), Sec. 53 (Appointment Discretionary with the Court); 2 Clark, *supra*, Sec. 702 (Federal Courts Appointing Receivers of Corporations), Sec. 747

enterprise involved is a public utility whose continued operation is necessary in order that the public be served. *Re Metropolitan Railway Receivership*, 208 U.S. 90, 112; *Sage* v. *Memphis & Little Rock Railroad Co.*, 125 U.S. 361; *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 216 Fed. 458, 462 (C.A. 2), 225 Fed. 734, 735 (C.A. 2).

Upon his appointment, the receiver takes possession of the business, including all pertinent real and personal property, in order to "preserve, manage, operate and control the same" for benefit of the party ultimately proved to be entitled, usually the owners and the creditors. *Re Metropolitan Railway Receivership, supra*, at 95. *Quincy Railroad Co.* v. *Humphreys*, 145 U.S. 82, 97; *Chicago Union Bank* v. *Kansas City Bank*, 136 U.S. 223, 236. He operates the business himself, or supervises its activities when they are carried on by others. His possession and control are terminated as soon as reasonably proper,—ordinarily, upon the resumption of normal conditions—at which time possession of the enterprise is returned to the owners. *Re Metropolitan Railway Receivership, supra*, at 112.

b. The resemblance of the present take-over to such an operating receivership is manifest, and there is no reason why the concept cannot be extended to these circumstances. The coal strike pre-

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(Grounds for Appointment of Receiver in Stockholders' Suits), Sec. 908 (Appointment of Receiver in Building and Loan Associations).

sented the Government with an emergency situation which threatened the entire war effort. The most effective remedy which seemed available was to take temporary possession of the mines for the limited purpose of ending the stoppage in production which had resulted, and to ensure continued war production. Such a purpose is obviously of far greater importance than that for which an operating receivership is customarily created, though it is not different in kind. The creation of a receivership to take possession, manage and control property is regarded as a drastic remedy not lightly to be invoked, but as this Court said, in approving the receivership of the New York City street railway system involved in the leading case of *Re Metropolitan Railway Receivership, supra* (208 U. S. at 112):

> There are cases—and the one in question seems a very strong instance—where, in order to preserve the property for all interests, it is a necessity to resort to such a remedy. A refusal to appoint a receiver would have led in this instance almost inevitably to a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims, and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives.

Significant as were the considerations on the basis of which this Court approved that receivership, they are, as pointed out by Under Secretary Patterson (*infra*, p. 78), of trifling moment compared to the importance to the nation of uninterrupted production in time of a national emergency.

The take-over is comparable to a receivership not only in goal but also in form. As far as the critical language is concerned, Executive Order 9340 is, for all practical purposes, a replica of an operating receivership's authorization; the order directs the Secretary of the Interior "to take immediate possession, so far as may be necessary or desirable, of any and all mines * * * together with any and all real * * * property, [etc.] * * * and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war * * *." The Secretary's supervision and control over the mines certainly did not exceed that of a receiver. As in a receivership, the business continued to be operated for the account of the owners, and the Government retained control of the property only until it was clear that full production was again attained. If anything, the coal mine "seizure" falls short of an operating receivership, rather than going beyond it. The operating receiver not only takes physical possession of the property but he actively manages and operates the property during the period of the receivership. On the other hand, the

Government took only token possession of the mines, at most, and it did not interfere with the general management or operation.[46]

2. a. Perhaps an even more striking and appropriate analogy is that to a conservatorship in the banking field, for, like the Secretary of the Interior in this case, such a conservator is normally a Government administrative official. Both the federal and state governments have for many years provided for the appointment of conservators for banks, savings and loan associations, and other financial institutions, who take possession

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[46] One district court has appointed an operating receiver in order to restore service on a struck railroad. *Farmer's Grain Co.* v. *Toledo, P. & W. R. R.*, 66 F. Supp. 845 (S.D. Ill.), reversed, 158 F. 2d 109 (C.A. 7), certiorari granted, 330 U. S. 816, reversed for mootness, 332 U. S. 748. In that case, the Government had seized the railroad in 1942 because a wage dispute threatened its operations and a Federal Manager had profitably operated the property for the account of the owners until 1945 when the railroad was returned to its corporate management. Upon the release of federal control, however, the workers went on strike again because they were unable to agree with the management as to the terms and conditions of employment, and as a result the railroad ceased to function. Thereafter, several shippers, complaining of the lack of service, instituted proceedings, seeking, among other things, the appointment of an operating receiver as an efficient and effective remedy for restoring service on the railroad. The district court agreed with the shippers and appointed a receiver to do virtually the same things as the Federal Manager previously had done with reference to the same railroad and as the President directed the Secretary of the Interior to do in the present case, if necessary or desirable (66 F. Supp., at 856). The court of appeals' reversal of this action of the district court was based on the ground that the courts may appoint receivers only as an incident to other relief. 158 F. 2d 109, 116. That restriction would not, of course, apply to action by the legislative or executive branches, if properly authorized.

and control in order to operate for the benefit of depositors and creditors. See *Fahey* v. *Mallonee*, 332 U.S. 245, 250-253.

The chief federal statute is Section 203 of the Bank Conservation Act of March 9, 1933 c. 1, 48 Stat. 2, 12 U.S.C. 203. That provision authorizes the Comptroller of the Currency, "whenever he shall deem it necessary in order to conserve the assets of any [national] bank for the benefit of the depositors and other creditors thereof," to appoint a "conservator for such bank." Under the Comptroller's direction, the conservator is to "take possession" of the bank and its property "and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law." The purpose of this Act was "to enable the Comptroller to appoint conservators rather than receivers where, in his judgment, there was a prospect that the bank of which a conservator should be appointed might, under his direction and control, later reopen and resume its corporate functions." *Davis Trust Co.* v. *Hardee*, 85 F. 2d 571, 572 (C.A. D.C.). The conservator's appointment is the "equivalent of the appointment of a receiver of a corporation with leave to continue the business * * *." *Smith* v. *Witherow*, 102 F. 2d 638, 642 (C.A. 3). The validity of the provision has been expressly upheld. *Smith* v. *Witherow, supra.* Similar federal statutes are the Banking Act of 1933, Sec. 31, 48

Stat. 162, 194, 12 U.S.C. 71a, the National Housing Act, Secs. 306, 406, 48 Stat. 1246, 1255, 1259, 12 U.S.C. 1721, 1729, and Sec. 5(d) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464 (involved in *Fahey* v. *Mallonee, supra*).

Many states also authorize the state official in charge of banking affairs to "take possession", in specific circumstances, of the "business and property" of a state financial institution, or to appoint a conservator to operate it. See *Fahey* v. *Mallonee, supra,* at 253, fn. 2, and Brief for Appellants in that case (Oct. T. 1946 No. 687), at pp. 68-72, 120-126.[47]

Such possession may usually be taken, under both federal and the state statutes, for a variety of reasons:—violation by the institution of basic provisions of statute or charter; need to conserve assets in order to protect shareholders and creditors from loss; threat of insolvency; actual insolvency; unsound, unsafe, or unlawful operation; incompetency, fraud, recklessness of management; operations hazardous or injurious to creditors or

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[47] *E.g.*, the *New York Banking Law*, section 606, provides for the superintendent of banking to "forthwith take possession of the business and property of any banking organization whenever it shall appear that such banking organization" has done any of ten specified things. In Massachusetts, the commissioner of banks "may take possession forthwith of the property and business" of the bank. *Annotated Laws of Mass.*, Vol. 5, ch. 167, sec. 22. In California, the commissioner "may forthwith demand and take possession of the property, business and assets" of building and loan associations falling within the specified classes. *Deering's California General Laws*, Vol. 1, Act 986, sec. 13.11.

the public; refusal to obey a valid order issued by the supervisory official. See Brief for Appellants in the *Fahey* case, *supra*, at 64-66, 69-71, 111-112, 120-126.[48]

b. Except that it is much less severe in its incidence, the instant take-over does not differ in form or in substance from such a conservatorship. In both cases, the one who takes possession is an executive or administrative official, acting on behalf of the government and the public. He takes "possession" of the "business", "property", and "assets". The operation continues for the benefit and account of owners and creditors, and in their interest as well as that of the general public, and not for the government's pecuniary interest. The taking of possession is temporary, and control is returned after the situation causing the take-over has been corrected or adjusted. In their different spheres, the reasons for taking possession are quite comparable:—in the one case, preservation of the safety and standing of a bank as an operating institution; in the other, maintenance of labor peace and continued production in a vital wartime industry.

It follows, we believe, that the mine "seizure" can properly be classed as an executive conserva-

[48] Comparable control and supervision may usually be exercised over insurance companies. See Patterson, *The Insurance Commissioner in the United States* (1927) 94-5, 437-440. The administrative liquidator of an insurance company is also a familiar figure. Cf. *Clark* v. *Williard*, 292 U. S. 112.

torship or operating receivership. Every document that was issued, every Government action which was taken, is consistent with this view,[49] and there is neither need nor warrant for invoking eminent domain or the idea of a "taking". The establishment and maintenance of a conservatorship or receivership is plainly an exercise of non-eminent domain regulatory powers—powers which have not been challenged in this suit, and could not well be.

3. This conception of the take-over of struck mines or plants as a federal receivership or conservatorship was publicly advanced in November 1941, long before the coal mines were "seized" in May 1943. At the hearings held by a subcommittee of the Senate Judiciary Committee on S. 2054, 77th Cong., 1st Sess., a predecessor of the bill which ultimately became the War Labor Disputes Act, Under Secretary of War Patterson said, in discussing the plant seizure provision of S. 2054, (Hearings before Subcommittee of the Senate Judiciary Committee on S. 2054, 77th Cong., 1st Sess., pp. 13-14 (November 1941)):

> Secretary Patterson. I suppose, if the Government took over, under the provisions of

[49] This is true of everything mentioned by the Court of Claims as being done or ordered by the Government, including the display of placards bearing the legend "United States Property", the distribution of posters and booklets containing the Executive Order and the President's radio address of May 2, 1943, the regulation that the Government's "possessory

this act, it would be acting a good deal in the capacity of a receiver.

Senator Connally. Or a proprietor.

Secretary Patterson. A receiver that would be charged with the continuity of operation of the plant, and, of course, a return to the normal private management as soon as possible.

* * * * *

Secretary Patterson. * * * I view this really as the equivalent of a temporary receivership. Not in the sense at all that any plant is financially embarrassed. Where you have had, for many years, a rule that a receiver could move in at the instance of creditors or of dissenting stockholders when they think there is trouble in management or operation of a plant and when they feel their interests are imperiled, it strikes me that those things are really, important as they are, of trifling moment compared with the necessity for continuous production for national-defense purposes. * * *

Senator Hatch. As a matter of fact, this is not a drastic bill at all, is it, Mr. Secretary?

Secretary Patterson. It does not seem so to me, when you think how the conduct of a business is taken over by a court every day of the year in ever (*sic*) State in the Union, I suppose because they think the interests of persons who have loaned money to the plant may be jeopardized.

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interest" is "deemed" to be protected by the criminal laws protecting federal property, and the various other specific directives discussed above (*supra*, pp. 11-16, 37, 55 *et seq.*).

This characterization of a take-over as a temporary operating receivership was expressly accepted and used by at least one of the members of the subcommittee (Senator Burton). Hearings, *supra*, pp. 16, 18, 71, 129-130. And, in the course of the hearings, Senator Connally described the status of the private employer as one who "will continue to operate it under the supervision of the Government, under the same conditions that he operated it heretofore". (Hearings, p. 55). He further queried (Hearings, p. 57):

> Is there anything unfair to the employer to say, "Mr. Employer, you have a plant here which is producing, or ought to be producing, national-defense articles. We are going to require you, for the duration of this emergency, to go on operating under the same relationships with your men that you had, that were assumed voluntarily, prior to the emergency.
>
> We are not going to draft your plant and take it away from you; we are going to pay you what is fair and what is just under the law."[50]

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[50] Senator Connally's reference to fair and just payment does not imply that he was necessarily thinking in terms of a Fifth Amendment taking, and should be read in light of the following colloquy with Senator Ellender, in the course of the debate on the War Labor Disputes Act (89 Cong. Rec. 3811):

> Mr. Ellender. Is it not true that whenever the Government has taken over a plant, as has been done in the past, the management has remained the same and there have been no damages of any kind to the owners of the plant?
>
> Mr. Connally. I will say to the Senator that I think that is true in every case except, probably, one where the

Mr. Lee Pressman, representing the C.I.O. in opposition to the measure, pointed out that the take-over proposal in S. 2054 differed radically from the requisition, drafting, or condemnation of property under the eminent domain statutes or Section 9 of the Selective Training and Service Act. Hearings, *supra*, p. 143.

On the other hand, we know of nothing in the hearings on S. 2054, or in the legislative history of the War Labor Disputes Act, which requires the conclusion that Congress viewed a take-over as necessarily involving a constitutional taking rather than an operating receivership or conservatorship. Some statements were made in Congress that the owners or operators would receive fair and just payment or just compensation (89 Cong. Rec. 3895-6, 5724, 5792), but the context reveals, we believe, that, at most, the references were all to plants or mines which were fully taken by the Government and run for its account, or, perhaps, to instances in which there would be drastic interferences with the user's possession and control—not to the type

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management was in turmoil and the Government went in and effected a reorganization.

Mr. Ellender. I meant in most cases. I had in mind the case to which the Senator refers.

Mr. Connally. Except for that one case, I think the management was the same, the property was returned to the owners, and nobody was damaged, and, so far as I know, no compensation was paid to the owners for any damages.

Mr. Ellender. As I understand, under the recent seizure of the coal mines the management will not be changed to any extent.

of take-over involved here or in *Wheelock*, Nos. 169 and 177. There are no indications that a take-over could not stop short of a constitutional taking, or that just compensation had to be paid where the possession remained that of a receiver, conservator, or custodian.[51] Congress desired to make payment only where it would be required to do so by the Fifth Amendment, and in no other circumstances. See also the Government's Brief in *Wheelock*, Nos. 169 and 177, at pp. 37-8.

4. Recent state statutes providing for state "seizures" of certain struck businesses also indicate the appropriateness of characterizing the instant take-over as an operating receivership. For the statutes of Virginia, Massachusetts, and Hawaii undertake to define the relationship between the state and the owner in terms suitable only to such a receivership.

Chapter 9 of Virginia Acts of Assembly, (Extra Sess. 1947) authorizes the governor to take possession and operate certain public utilities for the purpose of preventing interruption or suspension of operation because of labor disputes. Section 12 of that Act provides that the state shall retain "as compensation for its services in operating the utility," 15% of the net income earned during the period of state control, with net income computed

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[51] Senator Tydings' statements, quoted above in fn. 28, pp. 43-4, as well as Senator Connally's, quoted above in fn. 50, p. 79, would seem to show an explicit awareness that something much less than a "taking" could properly be ordered under the Act.

after deducting from gross income, as one of the items of expense, reinbursement to the state of all expenses incurred by it in preparing to operate the utility.[52]

The Massachusetts statute (Acts and Resolves of Massachusetts, 1947, c. 596) authorizing the Governor to make such seizures provides in Section 4(a) (B) (1) that the Governor may:

> Take possession of any plant or facility of a party to the dispute the operation of which by the commonwealth he deems to be necessary as a result of such dispute, in order to safeguard the public health or safety. * * * Such plant or facility shall be operated for the account of the person operating it immediately prior to the seizure; provided, that such person shall have the right to elect, by written notice filed with the governor within ten days after such seizure, to waive all claims to the proceeds of such operation, and to receive in lieu thereof fair and reasonable compensation for the appropriation and use of his property * * *.

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[52] This Virginia statute is to be contrasted with the earlier Virginia Act of February 22, 1946 (Acts 1946, ch. 39, p. 59, Code, 1946 Supplement (Michie), Sec. 2072 (33)), providing for the temporary taking over and operation by the State of ferries. That statute specifically "vested" the State Highway Commissioner "with the power of eminent domain, so far as same may be necessary, to acquire for temporary use in connection with the State Highway System any such ferry, the normal operation of which has been so impaired or suspended. * * *." (Sec. 2). The ferry was to be operated "for the account of the State Highway Department" (Sec. 4), and the owner was "to receive reasonable, proper, and lawful compensation for the use of the ferry * * *." (Sec. 6). See *Anderson* v. *Chesapeake Ferry Co.*, 186 Va. 481.

The Hawaii Stevedoring Industry Act (Act 2, Spec. Sess. Law, 1949), which was to expire 180 days after its effective date, authorized the Territorial Governor to seize any struck stevedoring company. Section 3 provided that each company shall be operated by the Governor for the "account of the company," but each company was given the right to elect "to waive all claims * * * to the revenues of operations, and to receive in lieu thereof fair and reasonable compensation for the appropriation and use of its property, without allowance for prospective profits * * *."

These statutes are not only consistent with, but are solely explicable as, authorizing the establishment of an operating receivership. Otherwise, Virginia would not be justified in retaining 15% of the net income as a management fee, nor would Massachusetts or Hawaii have undertaken to operate the plant on the account of the person operating it immediately prior to the seizure.[53]

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[53] The Missouri statute ((Laws of Missouri, 1947) H.B. 180) merely authorizes the Governor "to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest" (Section 19), and does not undertake in any way to define the relationship of the State to the prior operators of the enterprise during the period of state control.

The New Jersey statute (N.J. Rev. Stat. Cum. Supp. 1945-1947, Section 34:13B-1 *et seq.*) similarly omits any reference to the state-operator relation during state control. Section 34:13B-13 provides that the Governor may "take immediate possession of the plant, equipment or facility for the use and operation by the state of New Jersey in the public interest," and that he shall return the seized property "to the owners thereof as soon as practicable after the settlement of said labor dispute." The statement of policy in Section 34:13B-1, that

5. In its opinion, the Court of Claims says that unless the present take-over constituted a constitutional taking the documents issued by the Government would be "all pretense and sham", and the necessary implication would be that the Government had practiced a "fraud" upon the miners (R. 44). We do not believe that these accusations could justly be leveled even if the idea of a receivership or conservatorship had not been readily available to be borrowed and applied. In the *Marion & Rye Valley Ry.* case (*supra*, pp. 47-9), after World War I, the Court of Claims did not feel compelled to find a constitutional taking, even though it was presented with government orders and proclamations wholly comparable in their terms to those issued here. That case had long been on the books when Executive Order 9340, and the subsidiary orders, were proclaimed. Moreover, the formal taking of "possession" on behalf of the United States would not, we submit, be a pretense or a fraud upon the miners if it meant only that the United States, as *parens patriae* or as prime custodian and trustee of the Nation's welfare in wartime, would now be the ultimate arbiter of the terms and conditions of employment.

"after the taking of possession of any public utility * * *, such public utility shall become for purposes of production and operation a state facility and the use and operation thereof by the state in the public interest shall be considered a governmental function of the state of New Jersey" and the definition of the relation between New Jersey and the persons employed at the seized plant as that of employer-employee (Section 34:13B-19) are inconclusive on the question presented here.

And except on a casual or colloquial reading of the orders and regulations, there was no reason to believe that the Government had undertaken to do more, unless later circumstances required.

In any event, the court's conclusion wholly disregards the cardinal fact that the "seizure" was, or at least could have been, a form of receivership or conservatorship. As we have said (*supra*, 44-5, 71-2, 76-7), every action taken by the Government, including the posting of signs describing the mines as "United States Property" (R. 22), was consistent with the establishment of such a receivership. The Government would surely not be "dishonest" or lacking in "integrity" (R. 44) if it induced the miners to return to work by instituting the type of control a receiver has over a railroad or a conservator over a bank.

Moreover, not only was it immaterial to the miners whether the Government's "seizure" constituted a "taking" or an operating receivership, but it is clear that they fully appreciated the limited scope and purpose of the "seizure". In the Hearings before the House Committee on Ways and Means, on Extension of Bituminous Coal Act of 1937, 78th Cong., 1st Sess., Mr. Percy Tetlow, representing UMWA, described Secretary Ickes "as custodian of the mines under an Executive order of the President" (p. 407), stated that Secretary Ickes "was only concerned in getting the mines operating, as custodian of the mines" (p. 408) and that he "was operating [the mines] for

the operators" (p. 410). To the question whether UMWA was "planning to ask that the mines be nationalized and the Government pay the increases," Mr. Tetlow answered: "No; we certainly do not favor the nationalization of the mines. We are not in favor of that. We think they should be operated by the owners." (p. 410).[54]

E. United States v. United Mine Workers, 330 U.S. 258, *does not require a different conclusion.*

The problem raised by the instant case, while recognized in the opinion of the Court in *United States* v. *United Mine Workers,* 330 U.S. 258, was expressly not passed upon by the Court. That case, which arose during the fourth government coal mine seizure in 1946-1947, presented no question as to the relationship of the Government *vis à vis* the operators during the period of federal control. The Court was concerned only with the relationship between the Government and the miners, and then only for the limited purpose of determining the applicability of the anti-injunction provisions of the Norris-LaGuardia Act. The question, as stated by the Court (330 U.S., at 285-286), was

> not whether the workers in mines under Government seizure are "employees" of the Fed-

[54] To the extent that it made any difference to the miners or other workers in a government-"seized" business, they would prefer, it seems to us, the definition of legal relationships which would minimize the owner's recovery on account of the "seizure." The less the owner stood to gain from the "seizure," the more would be the pressure on him to seek its termination.

> eral Government for every purpose which might be conceived [citing Sec. 23 of the Revised Regulations for the Operations of the Coal Mines Under Government Control, which provides "* * * nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment"] but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of governmental employer and employee.

In holding that the miners were employees of the Government for this purpose, the Court relied heavily upon the objectives of government control and the Krug-Lewis agreement to which, the Court noted, the operators were not a party (330 U.S. at 287). The Court refused, however, to "express any opinion as to the validity" of the various provisions of the Regulations defining the Government-operator relationship [55] since they had "little persuasive weight in determining the nature of the relation existing between the Government and the mine workers" (330 U.S., at 288). It is plain, therefore, that the Court viewed the Government-operator relationship as having little bearing on

[55] The Court's opinion refers specifically to provisions of the regulations which provided that "none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government; that the companies continue to be liable for all Federal, State, and local taxes; and that the mining companies remain subject to suit" (330 U. S., at 288).

the issue of Government-miner relationship then before it, and that it left completely open the questions raised here. Nothing in the Court's opinion even suggests that merely because the Government, as the court below puts it, "asserted the complete right to direct control and control [but], in fact, never exercised this right" (R. 44), there was a "taking" of the operators' "property," or that limited control over the operators' activities would constitute the transfer of a proprietary interest to the United States.

Furthermore, nowhere in the concurring opinion of Justice Frankfurter or the dissenting opinions of Justices Murphy and Rutledge, is there any indication that these Justices considered the Court's opinion as defining the relationship between the Government and the operators, or that they believed that the Government had taken, in the Fifth Amendment sense, the mining properties from the operators (330 U.S., at 307, 335 *et seq.*). The implications of these opinions are, rather, to the contrary (see 330 U.S., at 320, 322, 337-339).

Justices Black and Douglas alone expressed the thought that "the Government operates these mines for its own account as a matter of law," and they referred to "full and complete government operation for its own account." But, at the same time, they recognized that this was "apparently contrary to the implications of the regulations" (330 U.S., at 329). As our entire argument in this case and in *Wheelock* shows, we do not believe that the

War Labor Disputes Act (under which the motor carriers were "seized"), or the President's executive authority (under which the present "seizure" took place), required the Government's possession to be as complete as in a constitutional taking, or would invalidate the regulations issued here and in *Wheelock*. But even if we are wrong, that issue is not present in either suit. In both cases, the administrative regulations have not been challenged by either party, and their validity is not in dispute. Both the United States and the respondents (Pewee and Wheelock) have heretofore assumed the lawfulness of the administrative orders and regulations, and have acted on that basis. In these circumstances, it is both procedurally proper and substantively just to make the same assumption in this Court, and, insofar as respondents are concerned, to treat the take-overs as not involving operation by the Government for its own account.[56]

II

Even If There Were a Technical Taking, Respondent Is Not Entitled to Any Compensation

Having held that there had been a taking, the Court of Claims turned to the question of compensation. The court rejected respondent's claim that

[56] By way of analogy, if Congress had authorized and directed the executive to condemn the fee title of certain property and, nevertheless, the Government officials, with the owner's full acquiescence, had taken only a leasehold for a number of years and had then turned the property back, the owner could certainly not thereafter claim compensation for a full fee taking.

its compensation should be measured by the losses it sustained in operating its mine during the period of government control "because there is no showing that the Government's seizure of the mines caused the loss in operations" (R. 46).[57] Instead, relying upon the similar ruling in its contemporaneous opinion in *Wheelock*, the court awarded, as the measure of just compensation, the amount of increased benefits which Secretary Ickes directed to be paid to the miners in accordance with WLB's findings of May 25, 1943, *supra*, pp. 6, 12-13, 16, 17.

In our brief in *Wheelock*, we show the unsoundness of the Court's measure of damages, as there applied (See Brief for the United States in Nos. 169, 177, pp. 56-60). We think that its holding in this case is, *a fortiori*, groundless, for here, unlike *Wheelock*, the Government's intervention and WLB's subsequent award were fully acceptable to the operators. There is no reason to believe, and there is no proof, that respondent would have refused to pay these increased benefits had the miners been willing to continue working on that basis without government control (*supra*, pp. 61-2). Consequently, there is no showing of any loss or injury attributable to the alleged taking.

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[57] While there is no question presented in this case as to the propriety of this action of the Court of Claims, the question is raised by the cross-petition in *Wheelock*. As we show there, the court's rejection of operating loss during the control period (regardless of its connection with the "seizure"), as the measure of compensation, was sound. See Brief for United States in Nos. 169, 177, pp. 60-77.

In addition, it is plain, as in *Wheelock*, that federal intervention resulted in a net benefit to respondent. At the time that the Government "seized" the mines, the miners were refusing to go into the mines and produce coal unless their demands for substantial increases in wage benefits were satisfied. These increased benefits were estimated as involving an additional cost of about $5 per day for each miner, which, in the case of respondent, employing 150 miners, amounted to about $750.00 per day. The operator's refusal to accept these demands would have left them subject to the heavy overhead costs of idle mines for the period of time until, as a result of economic attrition, they arrived at a wage agreement with the miners. Lacking federal intervention, therefore, respondent and the rest of the industry were faced with the dilemma of maintaining idle properties or of meeting UMWA's substantial contract demands. Apparently to avoid the horns of this dilemma, the operators were anxious that the Government intercede and repeatedly requested it to do so (R. 5, 7).

Thus, the operators benefited substantially from the President's "seizure" of the mines in two ways. First, they did not have to bear the overhead costs of idle mines. It would be hard to find a bigger liability than an inactive coal mine. The expense of maintaining its operating efficiency must be incurred or else it may soon become unusable.

Then, too, whether the mine is producing 1000 tons or zero tons per day, there are various fixed charges that remain the same as, for example, depreciation on plant and equipment.[58] Indeed it was the constant pressure of such charges which seems to have led to Pewee's improvident tonnage practices, *supra*, pp. 16-17. Secondly, Pewee was benefited by being both freed from having to satisfy anything but a small fraction of UMWA's total demands, and protected during the period of federal control against the renewal of the miners' wage demands. The miners made it clear that they would work for any amount less than their full demands only under the auspices of the Government, and after the issuance of Execu-

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[58] "Coal operators are very sensitive to changes in the volume of production since there is an unusually large element of overhead. Capital charges go on unabated, and as days of operation diminish, the cost per ton increases rapidly. Property taxes are in no way moderated. Insurance has to be kept up. Pumping and ventilation costs do not diminish proportional with decreased tonnage. Depreciation goes on faster when the mine is idle than when it is working. Gas and acid waters require use of men, materials, and power. If the mine is mechanized, fixed charges are greater than otherwise in relation to direct costs * * *

"Furthermore, the pressure to maintain production is brought about by the fact that if the mine is not maintained at operating efficiency it shortly becomes completely unusable. Falls of roof, squeezes, etc., set in and make recovery difficulty if not impossible. The investment, in other words, has a very definite time element running against it. Maintenance workers' pay continues regardless of the time the mine operates. Superintendents must be paid; office employees are hired by the month." *The Coal Industry* by G. L. Parker, at p. 6. See also Hearings before House Committee on Ways and Means on Extension of Bituminous Coal Act of 1937, 78th Cong., 1st sess., at pp. 241-244.

tive Order 9340 they ultimately agreed to return to the mines, until October 31, 1943, on the condition that the arrangement would "automatically terminate if the government control is vacated" before then (R. 17).

That Pewee was aware of the great benefits it would and did receive from the Government's seizure of the mine is manifest both from the eagerness with which it welcomed governmental action (R. 19), and from its recommendation of August 6, in response to the request of Secretary Ickes for information upon which he could make a determination as to release of the mines, that (R. 26-27):

> * * * in my opinion the Government should continue active control of the mines if not all mines, certainly mines such as ours whose finances are in none too good condition if and until a new wage contract is negotiated since anything like a $1.25 per day wage increase retroactive to April 1st would completely bankrupt such mining companies.[59]

And only a week before its mine was released on October 12, respondent seems to have discouraged the ending of control at that time. *Supra*, p. 15.

Clearly, therefore, even if there were a taking of Pewee's mine, it was not such a taking as entitled

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[59] In the latter part of July, 1943, UMWA signed a contract with a segment of the industry, to apply retroactively to April 1, 1943, which provided for this $1.25 payment and certain other benefits for the miners. 10 War Labor Rep. 684, 770.

Pewee to any compensation under the Fifth Amendment, for there was no showing that respondent incurred any loss as a result of the Government's actions, and, in any event, the benefits resulting to Pewee were far greater than any losses it may have suffered.[60] Accordingly, "nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss." *Marion & Rye Valley Ry. Co.* v. *United States,* 270 U. S. 280, 282. As the Court of Claims put it in the *Marion & Rye Valley Ry. Co.* case, since the company had suffered no net loss as a result of government control, "it would be gross injustice to require the United States to pay something for nothing." 60 C. Cls. at 252. (See also Brief for the United States in *Wheelock*, Nos. 169, 177, pp. 56-60).

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[60] Respondent bears the burden of proving that it suffered a net loss on account of the taking. *Marion & Rye Valley Ry.* v. *United States*, 270 U. S. 280, 285; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 273; *United States* v. *Felin & Co.*, 334 U. S. 624, 641; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396, 406; *United States* v. *Commodities Corp.*, 339 U. S. 121, 128.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed with directions to enter judgment in favor of the United States.

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DECEMBER 1950

APPENDIX

1. The Certificate of Appointment of Operating Managers, which is reproduced in the findings below (R. 19-21), provided:

> Whereas The Secretary of the Interior has, pursuant to the provisions contained in the Executive Order dated May 1, 1943, taken possession of the coal mines listed in the appendix attached hereto, I hereby designate and appoint you as Operating Manager for the United States for such mines. The Operating Manager shall have the following duties and authority, and shall perform the following functions:
>
> (1) The Operating Manager shall, subject to such supervision as may be prescribed, and in accordance with such regulations as may be promulgated, operate the mines listed in the attached appendix and do all things necessary and appropriate for the continued operation of such mines, and for the production, distribution and sale of the product thereof.
>
> (2) The Operating Manager and all other officers and employees of the company shall serve the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the production, distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

(3) The Operating Manager shall, in the operation of said mines, use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but he shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, he shall communicate with the appropriate Regional Bituminous or Anthracite Coal Manager of the Solid Fuels Administration for War for transmission of said request to the proper officials.

(4) The Operating Manager shall maintain customary working conditions in the mines and customary machinery for the adjustment of workers' grievances and shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owning or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.

(8) The Operating Manager shall be subject to such accounting as the Solid Fuels Administrator for War may, from time to time, prescribe; and shall be governed by all orders, rules and regulations issued by the Solid Fuels Administrator for War.

(9) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

(10) The Operating Manager shall, in such operation, distribution and sale, comply with all applicable Federal and State laws and regulations.

(11) The Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States, (name of Company)", but the action in either case is for all purposes affecting the possession and control of the United States or the orders and regulations issued or to be issued relating thereto, to be considered as done by the Operating Manager.

(12) This appointment shall terminate at the discretion of the Solid Fuels Administrator for War upon notice to the Operating Manager.

(13) The Operating Manager shall, with respect to mines which he reasonably expects to continue in normal, regular operation, submit a recommendation that operation of such mines for the Government be terminated.

(14) This appointment shall be effective immediately.

2. (a) The Coal Mines Regulations (8 Fed. Reg. 6655) as promulgated on May 19, 1943, provided:

PART 603—OPERATION OF COAL MINES UNDER GOVERNMENT CONTROL

GENERAL

§ 603.1 *Authority for regulations.* These regulations are issued under the authority of Executive Order No. 9340, dated May 1, 1943 (8 F.R. 5695), authorizing and directing the Secretary of the Interior

> * * * to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.

§ 603.2 *Scope of regulations.* These regulations shall govern the operation of all coal mines placed under Government control pursuant to Executive Order No. 9340 by orders of the Secretary of the Interior of May 1, 1943 (8 F.R. 5767) taking possession of all coal mines operated by the companies specified in the appendices attached thereto, including any

and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines and the distribution and sale of their products, for operation by the United States in furtherance of the prosecution of the war.

§ 603.3 *Effect of regulations.* These regulations shall supersede all prior orders or instructions governing the operation of such coal mines to the extent that such orders or instructions are inconsistent with these regulations.

§ 603.4 *Purpose of operation.* The primary object of Government intervention in the operation of the said properties is the maintenance of full production of coal for the effective prosecution of the war. All duties and authorities set forth in these regulations are to be construed in the light of this purpose, and if any regulation interferes with the accomplishment of this purpose, prompt application must be made to the Solid Fuels Administrator for War to secure the waiver or modification of such regulation.

§603.5 *Plan and policy of operation.* (a) Control of the operations of the coal mines will be exercised by the Government to the extent necessary to maintain maximum production. Wherever the cooperation of the company and its personnel can be secured, the existing organization of the mining company will be utilized, and the company will continue operation in the regular course of busi-

ness as a going enterprise, conforming with such directions as the Government may issue. Where the prompt and effective cooperation of a company cannot be secured, appropriate action will be taken under §§ 603.30 and 603.31 of these regulations.

(b) All properties in the possession of the Government shall be operated in a manner consistent with the fact that title to the properties remains in the owners thereof and that the Government, having temporarily taken possession or custody, will assert only such rights as are necessary to accomplish the national purpose of continued and maximum production.

(c) Possession and operation by the Government are to be terminated as soon as this can be done without injury to the furtherance of the war program.

§ 603.6 *Definitions.* (a) As used herein, (1) The term "coal mines" means the coal mines of which possession was taken by the orders of the Secretary of the Interior of May 1, 1943, and any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines and the distribution and sale of their products.

(2) The term "company" or "mining company" means the corporation, partnership, association, or individual in possession and control of coal mines immediately prior to the taking of possession of such coal mines by the Secretary of the Interior.

(3) The term "Solid Fuels Administrator for War" means the Administrator of the Solid Fuels Administration for War, created by the Executive order of April 19, 1943 (8 F.R. 5355).

ORGANIZATION FOR OPERATION

§ 603.10 *Supervision and direction.* The power, authority, and discretion of the Secretary of the Interior with respect to the operation of the coal mines may, under the authority of Order No. 1807 of the Secretary of the Interior dated May 1, 1943 (8 F.R. 5767), as amended by Order No. 1812, dated May 6, 1943 (8 F.R. 6006), be exercised by the Solid Fuels Administrator for War (hereinafter referred to as the Administrator) and, subject to his supervision, by the Deputy Solid Fuels Administrator for War (hereinafter referred to as the Deputy Administrator) to the same extent and with the same effect as such power, authority, and discretion may be exercised by the Secretary of the Interior. The power, authority, and discretion of the Administrator and Deputy Administrator may be exercised by them through such personnel of the Solid Fuels Administration for War and the Department of the Interior and in such manner as the Administrator or Deputy Administrator may determine. The authority to direct and supervise the operation of the coal mines within their respective territories has been delegated, subject to the supervision of the Administrator and Deputy Admin-

istrator, to the Regional Bituminous Coal Managers and the Regional Anthracite Coal Manager (hereinafter referred to as the Regional Managers).

§ 603.11 *Designation of Regional Managers.* Within each region served by a field office of the Bituminous Coal Division of the Department of the Interior, the manager of the said office, or such other person as the Administrator may appoint, shall serve as Regional Bituminous Coal Manager. Within the anthracite coal mining region in Pennsylvania, the Chief of the Mineral Production Security Division in the Bureau of Mines of the Department of the Interior, or such other person as the Administrator may appoint, shall serve as Regional Anthracite Coal Manager.

§ 603.12. *Duties of Regional Managers.* Each Regional Manager is authorized, subject to the orders of the Administrator, to exercise full powers of supervision and direction over the operation of all coal mines in the possession of the Government within his territorial jurisdiction during the period of Government control of the said mines. He shall have authority to issue (except as provided in §603.32) specific directions as to the production, sale and distribution of coal by the mines subject to his supervision, and as to all operating and financial arrangements for such mines. He shall also have authority to advise, and to issue directions, with respect to the construction of applicable orders and regulations.

All directions and orders shall be in writing and a copy shall forthwith be mailed to the Administrator.

§ 603.13. *Designation of Advisory Councils.* The Chairman and the Labor Representatives of each Bituminous Coal District Board in the territory covered by each of the several field offices of the Bituminous Coal Division shall constitute a Regional Advisory Council. The members of the Regional Advisory Council shall serve without compensation and will be expected to be on duty in the offices of the Regional Managers at such times and for such periods as may prove necessary. Where there are two or more chairmen of District Boards or two or more labor representatives on any Regional Advisory Council either or both groups may designate one man to serve in the absence of the others of such group. The two anthracite operator representatives on the Solid Fuels Advisory War Council and the anthracite labor representative on that Council, together with one other representative selected by him, shall serve as an Anthracite Advisory Council.

§ 603.14 *Duties of Advisory Councils.* (a) Each Regional Advisory Council shall serve as advisor to the Regional Manager within the area of its jurisdiction and to the Administrator, transmitting to the said Regional Manager all complaints and suggestions with reference to the operation of mines under Government control within the area of its jurisdiction, together with its recommenda-

tions respecting such complaints and suggestions and the reports of any investigations conducted with regard to the same. The members of each Regional Advisory Council shall be freely consulted by the Regional Managers, and any member may be assigned such executive duties as the Regional Manager may prescribe or delegate. Any member of the Regional Advisory Council shall be free to make specific or general suggestion or complaint to the Administrator who will give it his prompt and careful consideration.

(b) The Anthracite Advisory Council, in liaison with the Regional Anthracite Coal Manager, shall exercise powers and responsibilities similar to those of the bituminous coal Regional Advisory Councils.

§ 603.15 *Designation of Operating Managers.* (a) The operation of the coal mines of a mining company will ordinarily be entrusted to an officer of the company formerly in charge of operations who is authorized to act for the said company and who will, under appointment by the Administrator, during the period of Government control, act as Operating Manager for the United States, while continuing to serve as an officer and employee of the mining company. At the request of the said company, such person may be removed from the position of Operating Manager for the United States, and an officer or employee of the company nominated by the company may be appointed by the Administrator.

(b) Where the prompt and effective cooperation of the mining company in the operation of the coal mines under Government control cannot be secured, a person other than an officer or employee of the company may be designated as the Operating Manager for the United States by the Administrator.

(c) Where a company is in receivership or trusteeship, the receiver or trustee will ordinarily be designated Operating Manager for the United States.

§ 603.16 *Status of Operating Managers.* (a) Any officer or employee of a mining company who, with the permission of, or without objection from, the said company, accepts designation as Operating Manager for the United States of the coal mines of said company shall, together with all other officers and employees, serve in full recognition of his responsibilities to the Government and subject to all orders and regulations of the Administrator, but he and all other officers and employees shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control of its property.

(b) The Operating Manager shall continue to be subject to all restrictions and limitations imposed by the company upon his exercise of his authority. In respect of any action to which or in which the company requires its special consent or concurrence, the Operating Manager shall obtain such consent or concur-

rence before he takes such action. If consent is denied, the Operating Manager shall so report to the Regional Manager, stating the circumstances of the denial. The Regional Manager shall transmit the report to the Administrator, and the Operating Manager may proceed to take the action in question only upon direction of the Administrator.

(c) Designation of any person as Operating Manager for the United States shall not be deemed to constitute him an officer or employee of the United States within the meaning of Federal statutes governing personnel.

(d) The appointment of any Operating Manager shall terminate at the discretion of the Administrator upon notice to the Operating Manager.

§ 603.17 *Duties of Operating Managers.* (a) Operating Managers shall perform for their companies ordinary duties of management in accordance with established policies and practices, so far as consistent with these regulations and the instructions and orders of the Administrator and Regional Managers, and shall in addition perform all special duties placed on them as Operating Managers of the United States by these regulations, by their appointment instructions, so far as consistent with these regulations, and by such orders as the Administrator or the Regional Managers may issue.

(b) An Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has

been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States, (name of company)".

OPERATION OF MINES

§ 603.20 *Statement of property taken.* The Operating Manager of each mine shall promptly submit to the Regional Manager of the area in which the mine is located a statement specifically enumerating and defining the properties under his management, in accordance with a form to be furnished by the Administrator. Such statement shall be promptly submitted by the Regional Manager to the Administrator with recommendations as to any corrections that may appear proper and shall be subject to such correction as the Administrator, or any other official specifically designated for the purpose by the Administrator, shall from time to time find to be necessary. A copy of such revised statement shall be returned to each Operating Manager to serve as a guide to him and any successor Operating Manager in the performance of their functions.

§ 603.21 *Accounts and records.* (a) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

The same set of books may be used so long as items of payments, receipts, and all other transactions engaged in on and after May 1, 1943, may be easily separated from items concerning transactions engaged in before that date.

(b) The Operating Manager shall render such accounting as the Administrator may, from time to time, prescribe.

§ 603.22 *Financial and commercial transactions.* (a) Ordinary financial and commercial transactions shall be carried on so far as possible, in accordance with the customary procedures and policies of the mining company. The Operating Managers shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to continue the enterprise, utilizing any funds or properties due or belonging to the mining company, and shall draw upon the funds and accounts of the company, utilizing customary sources of credits or funds, and make all necessary disbursements. No major disbursements of an extraordinary nature shall be made without the approval of the Regional Manager.

(b) The Operating Managers shall, if the need arises, inform all third persons with whom they enter into such transactions that such transactions are being carried on, under the authority of the Government and the company, in accordance with customary procedures and policies, that the company remains subject to the usual methods of enforcement of its obligations, and that the Government

expects that the acts and agreements of the company will be accorded the same consideration and effect as in the absence of Government control.

§ 603.23 *Employment*—(a) *Working conditions.* In accordance with Executive Order No. 9340, the customary working conditions shall be maintained in all mines.

(b) *Collective bargaining.* In accordance with the terms of Executive Order No. 9340, the customary machinery for the adjustment of workers' grievances shall be maintained in all mines and the right of the workers shall be recognized to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operation of the mine.

(c) *Employment benefits.* All benefits enjoyed by employees of the mine under private control, including State and Federal insurance payments and benefits, workmen's compensation coverage, and group insurance, and all arrangements governing the payment of wages, including war bond purchase plans and the check-off of union dues, shall be continued.

(d) *Personnel.* Operating Managers shall use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any

eventual wage adjustments will be made retroactive, but they shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, they shall communicate with the appropriate Regional Manager for transmission of said request to the proper officials.

(l) All personnel of the mines, both officers and employees, shall be considered as called upon by Executive Order No. 9340 to serve the Government of the United States, but nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment.

§ 603.24 *Application of Federal and State Laws.* (a) The mining companies, their personnel and their property are deemed to remain subject during the period of Government control to all Federal and State laws and to actions, orders, and proceedings of all Federal and State courts and administrative agencies. The companies are expected to meet all Federal, State and local taxes, contributions, and assessments in the customary manner.

(b) The mining companies are deemed to remain subject to suit as heretofore. However, no Operating Manager or Regional Manager is authorized to bring suit, accept service, or enter any legal proceeding, on behalf of the United States without specific direction from the Administrator. Information as to the pendency, necessity, or probability of any

legal proceeding which casts in question any right of the United States should be promptly transmitted by the Operating Manager to the Regional Manager and by the latter officer to the Administrator, with appropriate recommendations concerning the assignment of legal counsel if such assignment is indicated.

(c) The possessory interest of the United States in the properties of the companies is deemed to be protected by the criminal laws protecting United States property.

ENFORCEMENT OF REGULATIONS AND ORDERS

§ 603.30 *Enforcement powers of Regional Managers.* In any case where the prompt and effective cooperation of a mining company cannot be secured, the Regional Manager may issue appropriate instructions for the operation of the coal mines of such company and shall immediately report the circumstances and his instructions to the Administrator. Pending receipt of directions from the Administrator, it shall be the duty of the Regional Manager to deny access to the premises to persons not contributing to the operation of the enterprise, to prevent any interference with the coal mines or the operations under Government control and to see that the production of coal is continued.

§ 603.31 *Removal of Operating Managers.* Upon failure of an Operating Manager to comply with these regulations or the orders of the Administrator or the Regional Managers or upon failure of a mining company

to respect the action taken by its Operating Manager who is an official of the company, the Regional Manager shall report to the Administrator the desirability of the removal of the Operating Manager, with such recommendations for a substitute as he may wish to make.

§ 603.32 *Use of military force.* Any request for the use of the armed forces of the United States to protect life or property in connection with the operation of any mine under the control of the United States shall be submitted by the Operating Manager in charge of the mine to the Regional Manager, who shall promptly transmit it with his recommendation and that of the liaison officer designated by the Secretary of War for the district in question, to the Administrator for decision as to whether a request for such protection shall be submitted to the Secretary of War pursuant to the provisions of Executive Order No. 9340. No Operating Manager and no Regional Manager shall have authority to make a request for military protection directly to any officer of the War Department or of the United States Army.

TERMINATION OF GOVERNMENT CONTROL

§ 603.40 *Methods of termination.* Government control of any property affected by these regulations may be relinquished in one of the following ways:

(a) Such control and possession of all properties under Government control, including

all accrued assets and rights, may be relinquished upon fulfillment of the following conditions:

(1) Satisfactory assurances shall be presented to the Administrator that under restored private control full operation of the coal mines will be continued;

(2) The mining company shall execute a ratification agreement by which it adopts and ratifies all acts performed by the Operating Manager for the United States in the operation of the coal mines of the company during the period of Government control and covenants and agrees that the Government of the United States and its officials are released from all claims by or on behalf of the company by reason of the possession and control of the coal mines, and that the company will hold the Government of the United States and its officials harmless with respect to any claims or liabilities arising out of acts performed during the period of such possession and control; and

(3) The executed ratification agreement shall be accompanied by evidence of the authority of the officer executing the agreement to act for the company in this respect. If the only official duly authorized to execute the agreement is the Operating Manager for the United States, or if no official has authority to execute the agreement without specific authorization from the Board of Directors, the executed agreement shall be accompanied by a

resolution of the Board of Directors authorizing the execution of the agreement. If the coal mines to be released were, prior to May 1, 1943, in the possession and control of an individual rather than of a company, the ratification agreement shall be executed by such individual, whether or not he is the Operating Manager for the United States. If the possession and control prior to May 1, 1943, were in a partnership, the ratification agreement shall be executed by all the partners.

(b) In the event that the mining company declines to adopt the acts of management performed during the period of Government control, the Administrator may, nevertheless, return to the said mining company the said property or portions thereof, retaining such assets and rights as may be necessary to compensate for any reasonable expenses incurred in the course of Government operation of the said property and to meet all outstanding obligations incurred in connection with such operation. Pending an accounting and adjudication of all such claims, and of any other claims of interested parties, including any claims of owners based upon negligence in the management of the property, such portions of the said property may be retained in Government control as shall appear to be adequate to cover all adjustments that may be required by such accounting and adjudication.

(b) Amendment No 1 to the Coal Mine Regulations, issued on July 29, 1943 (8 Fed. Reg. 10712) provided:

PART 801—REGULATIONS FOR THE OPERATION OF COAL MINES UNDER GOVERNMENT CONTROL

The "Regulations for the Operation of Coal Mines under Government control" issued by the Secretary of the Interior on May 19, 1943 (8 F.R. 6655), previously designated §§ 603.1 to 603.40, inclusive of Chapter VI are redesignated §§ 801.1 to 801.40, inclusive of Chapter VIII and are amended, as follows:

1. Subparagraph (3) of § 801.6 is amended to read as follows:

(3) The term "Coal Mines Administrator" means the Administrator of the Coal Mine Administration of the Department of the Interior.

2. Section 801.10 is amended to read as follows:

§ 801.10 *Supervision and direction.* (a) The power, authority, and discretion of the Secretary of the Interior with respect to the operation of coal mines may, under the authority of Order No. 1847 of the Secretary of the Interior, dated July 27, 1943, be exercised by the Coal Mines Administrator (hereinafter referred to as the Administrator) and, subject to his supervision, by the Deputy Coal Mines Administrator (hereinafter referred to as the Deputy Administrator) to the same extent and with the same effect as such power,

authority, and discretion may be exercised by the Secretary of the Interior. The power, authority, and discretion of the Administrator and Deputy Administrator may be exercised by them through such personnel of the Coal Mines Administration and the Department of the Interior and in such manner as the Administrator or Deputy Administrator may determine.

(b) The "Regulations for the Operation of Coal Mines under Government Control" issued by the Secretary of the Interior on May 19, 1943 (8 F.R. 6655) are adopted and continued in effect except as amended, amplified and added to from time to time.

3. Paragraph (b) of § 801.17 is amended by changing the period at the end thereof to a comma and adding thereto the following:

* * * as hereinabove and hereinafter specified. No Operating Manager for the United States of any mining company is authorized or shall be regarded as having authority, express or implied, to bind or impose any liability on the United States or any of its officials or agents in the absence of a specific direction or order by the Administrator to that effect. Nor shall any operations of any mine property in the possession and control of the Government, or the proceeds, earnings or liabilities of such mine property in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as a specific written direction or order to that effect shall have been given by the Administrator.

4. Section 801.40 is amended to read as follows:

TERMINATION OF GOVERNMENT CONTROL

§ 801.40 *Method of termination.* Government possession and control of any property affected by these regulations will be terminated by the Administrator upon a determination by him that the requirements for the termination of such possession and control specified in the War Labor Disputes Act of June 25, 1943, have been fulfilled. After the termination of Government possession and control, and for the purpose of ascertaining the existence and amount of any claims against the United States so that the administration of the provisions of Executive Order No. 9340 may be concluded in an orderly manner, the Administrator may require the submission by any mining company of information relating to operations during the period of Government possession and control as hereinafter provided.

The Operating Manager for the United States of each mining company with respect to which the United States Government has taken possession and control shall advise the Administrator when, in his opinion, such requirements for the termination of such possession and control have been fulfilled, specifying the date of declared restoration of productive efficiency, and furnishing to the Administrator the factual evidence supporting his opinion.

Forthwith upon the termination of such possession and control by the Administrator, the mining company may elect to execute and deliver to the Administrator one of the two instruments described in paragraphs 1 and 2 below:

Either:

1. The mining company, by a duly authorized officer or agent, not later than ten days subsequent to such termination, unless such period is extended by the Administrator for good cause shown, shall execute and deliver to the Administrator an instrument of ratification (in the form to be prescribed by the Administrator) by which the mining company adopts and ratifies all acts performed by, and omissions of, the Operating Manager for the United States in the operation of the coal mines of the company during the period of Government control, and covenants and agrees that the Government of the United States and its officials shall not be subject to any claims by the mining company or others by reason of the possession and control of the coal mines of the mining company.

The execution and delivery to the Administrator of such an instrument (hereinafter called Instrument No. 1) shall be deemed to constitute a waiver by the Government of all rights which it may have to an accounting with respect to all operations during the period of Government possession and control, and a discharge of the Operating Manager for the United States from any liability to the Gov-

ernment with respect to all actions taken by him as such.

Or:

2. The mining company, by a duly authorized officer or agent, not later than ten days subsequent to such termination, unless such period is extended by the Administrator for good cause shown, shall execute and deliver to the Administrator an instrument which specifically reserves to the mining company the right to assert a claim for damage alleged to have been suffered by it during the period of Government possession and control as the direct result of a specific direction or order of the Administrator, or his duly authorized agent, but which in all other respects is the same as Instrument No. 1.

Such instrument shall:

a. Specify the particular direction or order of the Administrator which the mining company asserts directly resulted in damage to the mining company,

b. Specify the particular action taken pursuant to such direction or order, which action would not have been taken except for such direction or order, and which action, it is claimed resulted in damage to the mining company, and

c. Specify the nature of the damage asserted to have been so caused and the amount thereof.

The execution and delivery to the Administrator of such an instrument (hereinafter

called Instrument No. 2), provided such instrument is in conformity with the above prescribed requirements, shall be deemed to constitute a waiver by the Government of all rights which it may have to an accounting with respect to all operations during the period of Government possession and control, expressly reserving the right, however, to assert by way of offset to any such claimed liability, benefits resulting to the mining company from Government possession and control and any other defense against such asserted liability.

The mining company shall specify to the Administrator such further detailed information with respect to items a, b and c, above, as shall be requested or directed by the Administrator.

If, however, within ten days after the termination of possession and control by the Government, unless such period is extended by the Administrator for good cause shown, the mining company shall not execute and deliver to the Administrator either Instrument No. 1 or Instrument No. 2, as above provided, then the Administrator may assume that the mining company claims, or reserves the right to claim, that all operations during the period of Government possession and control of the property have been for the account of the Government, and accordingly that the Operating Manager for the United States and the mining company are accountable to the Government for their custodianship and disposition of proceeds from operations accruing

during the period of Government possession and control. Pending the completion of such an accounting, the appointment of the Operating Manager for the United States shall continue in force for the purposes of such an accounting and appropriate determinations with respect thereto.

Accordingly, in such an event the Operating Manager for the United States and the mining company shall forthwith cause to be prepared, and shall promptly furnish to the Administrator, the following:

1. A detailed Comparative Balance Sheet as of the date of the termination of Government possession and control and as of the date of the beginning of such period.

2. A detailed Statement of Income and Profit and Loss for the period of Government possession and control.

3. A physical inventory to be taken at the close of such period, for all items normally subject to inventory.

4. A Cost and Tonnage Statement for the period in the form to be prescribed by the Administrator.

5. A detailed analysis of all changes in Current Assets, Investments, Reserves, Fixed Assets and Deferred Charges accounts occurring during the period.

6. A detailed statement of all charges to Bad Debts or against Reserves therefor.

7. An explanation of the basis of charges for Depreciation, Depletion and Amortization for the period.

8. A detailed analysis of all changes in amounts due to or from affiliated companies.

Statements required under items 1 and 2 are to be certified by an independent Certified Public Accountant unless otherwise directed by the Administrator on the application for good cause shown by the mining company. Statements required under items 3 through 8 are to be certified by an authorized officer of the company.

In addition to the foregoing, the Operating Manager for the United States and the mining company shall furnish to the Administrator such additional data and information as the Administrator shall request or direct pertaining to the period of operation under Government possession and control and a fair evaluation of the results thereof.

For the purposes of checking any inventories, accountings or other information submitted under this section 40, accountants and other agents of the Government shall be given reasonable access to all books, papers and inventories of the mining company pertinent thereto.

The books and records of the mining company covering operations during the period of Government possession and control shall be maintained intact pending the completion by accountants or other agents of the Government of such inspection thereof as may be deemed necessary by the Administrator. The books and records of the mining company pertaining to operations subsequent to the ter-

mination of Government possession and control, and pending such inspection, shall be maintained in such fashion that the effect of such operations upon the condition of the company as of the end of the period of Government possession and control will be readily ascertainable.

None of the provisions of this section 40, and no action that shall be taken pursuant to any of them, shall be deemed to constitute acquiescence by the Administrator in any claim that operations during the period of Government possession and control were for the financial account of the Government, or acquiescence in any other claim that the Government is subject to any liability to the mining company or any other person or persons with respect to any such action, or otherwise.

None of the provisions of this section, nor any action taken pursuant to any of them shall be deemed to constitute a waiver by the mining company of any right which it may have to assert a claim against the United States, except as waived by the execution and delivery of Instrument No. 1 or of Instrument No. 2.

(c) Amendment No. 2 to the Coal Mine Regulations, issued on August 13, 1943 (8 Fed. Reg. 11344) provided:

FINANCIAL RESPONSIBILITY FOR OPERATIONS

The "Regulations for the Operation of Coal Mines under Government Control" issued by the Secretary of the Interior on May 19, 1943,

as amended (8 F.R. 6655, 10712) are further amended as follows:

1. Paragraph (a) of § 801.22 is amended by deleting the last sentence thereof.

2. There is hereby added two new sections, designated §§ 801.25 and 801.26 to read, respectively, as follows:

§ 801.25 *Interim procedure for confirmation of financial responsibility by mining company —(a) Execution and delivery of instrument of agreement and certification.* Any mining company, by a duly authorized officer or agent, may execute and deliver to the Administrator an instrument of agreement and certification (in the form to be prescribed by the Administrator) confirming (as hereinafter provided) the sole financial responsibility of the mining company for its operations. Such mining company may, however, as hereinafter set forth, reserve to itself the right to assert claims for liability against the Government with respect to damage allegedly resulting from any specific direction or order of the Coal Mines Administration. The operating manager for the coal mines of any mining company for which such instrument of agreement and certification is in effect shall not be subject to the requirements as to financial transactions and current accountings set forth in § 801.26. The instruments of agreement and certification may be terminated by the mining company at any time upon ten days' written notice, as hereinafter provided.

By said instrument of agreement and certification (subject to reservation of rights to assert claims for damage allegedly resulting from any specific directions or orders as provided in paragraph (c) of this section) the mining company shall:

(1) Agree and confirm as its understanding that the operations of the coal mines of the mining company, and all acts and omissions of the operating manager, from the date of the beginning of Government possession and control to the effective date of termination of the instrument, have been and will continue to be for the financial account of the mining company and not for the account of the United States; and

(2) Adopt and ratify all acts and omissions of the operating manager in the operation of the coal mines of the mining company during such period, and agree that the Government and its officials shall not be subject to any claims by the mining company or others by reason of the possession and control of the coal mines of the mining company during such period; and

(3) Certify that during such period the mining company will not make any disposition of its funds or incur any indebtedness which will impair the working capital of the company so as thereby to jeopardize maintenance of the maximum possible production of coal at its coal mines.

(b) *Effect of such instrument.* Subject to the reservation or rights as provided in para-

graph (c) of this section, the execution and delivery of such an instrument of agreement and certification to the Administrator shall be deemed to constitute a waiver by the Government of all rights which it may have to an accounting with respect to all operations from the beginning of the period of Government possession and control to the effective date of termination of such instrument, and a discharge of the operating manager from any liability to the Government with respect to all actions taken by him as such during that period.

(c) *Reservation of right to assert against the government claims for damage alleged to result from specific directions or orders.* A mining company which has executed and delivered such an instrument of agreement and certification may, nevertheless, reserve to itself the right to assert a claim for damage alleged to have been suffered, or threatened to be suffered, by it as the direct result of a specific direction or order of the Administrator, as hereinafter provided:

(1) As to any specific direction or order which has been issued prior to the date of issuance of these amended regulations, such reservation of right may be made by the mining company's transmitting to the Administrator, together with its executed instrument of agreement and certification, a writing, signed by a duly authorized officer or agent which shall:

(i) Specify the particular direction or order of the Administrator which the mining company asserts directly resulted in damage to the mining company,

(ii) Specify the particular action taken pursuant to such direction or order, which action would not have been taken except for such direction or order and which action, it is claimed, resulted in damage to the mining company, and

(iii) Specify the nature of the damage asserted to have been so caused and the amount thereof,

Upon such transmission to the Administrator of such written specifications, the mining company shall be deemed to have reserved all rights to assert a claim for damage alleged to have been suffered or threatened during the period of Government possession and control as the direct result of compliance with the specified direction or order, and the Government shall be deemed to have reserved all rights to assert by way of offset against any such claim of liability the benefits resulting to the mining company from Government possession and control, and to assert any other defense against such claim.

Failure by the mining company to transmit to the Administrator such a writing, together with its executed instrument of agreement and certification (unless upon request the Administrator shall extend the time for the transmission of the writing for good cause shown) shall be deemed to constitute acquiescence by

the mining company that the consequences of all specific directions and orders issued by the Administrator prior to the date of the issuance of these amended regulations shall be covered by clauses i and ii of the instrument of agreement and certification.

(2) As to any specific direction or order which may be issued subsequent to the date of issuance of these amended regulations, such reservation of right may be made by the mining company's filing a timely protest with the Administrator, as follows:

If, upon the issuance by the Administrator of a specific direction or order to an operating manager for the coal mines of a mining company, the mining company desires to reserve the right to assert a claim for damage alleged to be threatened to be suffered by it as the direct result of compliance with such specific direction or order, then the mining company shall protest such direction or order to the Administrator (as hereinafter provided), and in such written protest shall:

(i) Specify the particular direction or order of the Administrator which the mining company asserts will directly result in damage to the mining company if complied with,

(ii) Specify the action which, it is asserted, is required by such direction or order to be taken, which action would not be taken except for such direction or order, and which action, it is claimed, will result in damage to the mining company.

(iii) Specify the nature of the damage which the mining company asserts will be suffered by it as the result of compliance with such direction or order, and an estimate of the amount of such asserted threatened damage, and

(iv) Protest the specified direction or order.

Such protest shall be dispatched as aforesaid to the Administrator, Department of the Interior, Washington, D. C., by registered mail or telegram within five days of the receipt by the operating manager of the direction or order protested.

Upon the dispatch of such a protest as above provided, the effectiveness of the direction or order, as it applies to the operating manager for the coal mines of the protesting mining company, shall be suspended pending further directions of the Administrator. If thereafter the Administrator, in writing, confirms the effectiveness of the protested direction or order as it applies to such operating manager, such operating manager shall forthwith carry into effect the protested direction or order, with any modifications made by the Administrator in his confirmation thereof.

Thereupon the mining company shall be deemed to have reserved all rights to assert a claim for damage alleged to have been suffered by it during the remainder of the period of Government possession and control as the direct result of compliance with such protested direction or order, and the Government shall be deemed to have reserved all rights to assert by way of offset against any such claim of

liability the benefits resulting to the mining company from Government possession and control, and to assert any other defense against such claim.

In all other respects the provisions of the instrument of agreement and certification shall continue in full force and effect and the operating manager for the coal mines of the protesting mining company shall continue not to be subject to the requirements as to financial transactions and current accountings set forth in § 801.26. The operating manager, however, shall furnish to the Administrator, on his request, such pertinent information and data relating to the effect of compliance with the protested specific direction or order as the Administrator may request.

Failure by the mining company to file such a protest within the five days mentioned (unless upon request the Administrator shall extend the time for the filing of the protest for good cause shown) shall be deemed to constitute acquiescence by the mining company that the consequences of the said specific direction or order shall be covered by clauses i. and ii. of the instrument of agreement and certification.

In the event that the Administrator shall expressly require that a specific direction or order issued by him shall be complied with prior to the lapse of the five-day interval for transmitting a protest as above provided, then the operating manager shall comply forthwith with said specific direction or order and the

mining company may effect a reservation of right by transmitting, within ten days following the issuance of such express requirement, a writing in accordance with the specifications contained in subparagraph (1) above.

(d) *Termination of effectiveness of instrument of agreement and certification.* Any mining company having executed an instrument of agreement and certification, as above provided, may terminate the effectiveness thereof as to all future acts performed by, or omissions of, the operating manager in the operation of the properties of the mining company, by transmitting written notice of such termination, by telegraph or registered mail, to the Administrator, Department of the Interior, Washington, D. C., such termination to become effective ten days after the receipt of such notice by the Administrator.

In the event of such termination, the Administrator may assume that the mining company claims or reserves the right to claim that all operations from that date forward during the remainder of the period of Government possession and control of the mining property are for the account of the Government and accordingly that the operating manager for the United States and the mining company are accountable to the Government for their custodianship and disposition of proceeds from operations accrued during the balance of such period of Government possession and control.

Upon and after the effective date of termination of the instrument of agreement and cer-

tification, as herein provided, the operating manager for the coal mines of the mining company terminating such instrument shall be subject to the requirements as to financial transactions and current accountings set forth in § 801.26.

(e) *Non-acquiescence in claim of liability, and non-waiver of right to claim liability except as specifically waived.* None of the provisions of this section or of § 801.26 and no action that shall be taken pursuant to any of them, shall be deemed to constitute acquiescence by the Administrator in any claim that operations during the period of Government possession and control are for the financial account of the Government, or acquiescence in any other claim that the Government or any of its officials are subject to any liability to the mining company or any other person or persons with respect to any such action, or otherwise. None of the provisions of this section or of § 801.26, nor any action taken pursuant to any of them, shall be deemed to constitute a waiver by the mining company of any right which it may have to assert a claim against the United States except as specifically waived by the execution and delivery of an instrument of agreement and certification (subject to reservation of right to assert claims for damage alleged to result from specific directions or orders, as hereinabove provided).

(f) *Inapplicability of certain provisions of § 801.40 to mining companies executing an instrument of agreement and certification re-*

maining effective at termination of government possession and control. Where an instrument of agreement and certification has been executed and delivered by a mining company and remains in effect on the date Government possession and control of its properties is terminated by the Administrator pursuant to § 801.40 of these regulations, the company will be deemed to have satisfactorily complied with the requirements of that section for the execution and delivery of Instrument No. 1 or Instrument No. 2 therein described, as the case may be.

(g) *Furnishing of information and compliance.* Nothing in this section or in § 801.26 shall be deemed or construed to impair in any way the right of the Administrator from time to time to direct and require the furnishing of information pertinent to the operations of any mining company during the period of Government possession and control, having regard to the purposes of such possession and control as set forth in § 801.4 of these regulations, or the right of the Administrator to enforce compliance with orders or directions issued by him. Nor is anything in this section or in § 801.26 to be deemed to limit in any way the right of the Administrator at any time to exercise his lawful authority to any degree or to any extent as circumstances arise which, in his opinion, necessitate the exercise of such authority in order to effectuate the purposes of Government possession and control as set forth in § 801.4 of these regulations.

§ 801.26. *Requirements as to financial transactions and current accountings.* The operating manager for the coal mines of any mining company for which an instrument of agreement and certification as provided in § 801.25 is not in effect shall not make major disbursements of an extraordinary nature or dividend payments and shall not incur indebtedness other than in the course of normal business unless:

(a) At least ten days prior to the making of such disbursement or payment or the incurring of such indebtedness, the operating manager shall have filed with the Administrator a notice of intention to make such disbursement or payment or to incur such indebtedness, specifying in detail the amount and nature of and the necessity for the proposed disbursement, payment, or indebtedness, and the effect thereof upon the preservation by the mining company of a working capital sufficient to enable it to maintain maximum possible production; and

(b) The Administrator shall have advised the operating manager that he has no objection thereto.

The Administrator may at any time request or direct such operating manager to take whatever steps may be appropriate with respect to full and periodic accountings of the operation of the coal mines; inventories of all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of the coal mines

of the mining company and the distribution and sale of its products; the withdrawal of private management from further participation in the operation of the coal mines; and other pertinent matters. Upon the Administrator's request or direction, such operating manager shall furnish to him such data and information as he may request or direct pertaining to the period of operation under Government possession and control and a fair evaluation of the results thereof; the data requested may include such information for current periods as is specified in § 801.40 for the entire period of Government possession and control. The Administrator may require that financial statements be certified by an independent certified public accountant. Accountants and other agents of the Government shall be given reasonable access to all books, papers and inventories of the mining company.

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